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No. .....

In The

Supreme Court of the United States

October Term, 1984

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JOHN F. SIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFIN, LEMUEL B. GRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs-Petitioners,

v.

CITY OF MADISON, a municipal corporation,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state administrative agency's remedial order adversely affecting the seniority rights of a non-party employee creates an absolute bar to the affected employee's right to challenge that order under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Sec. 2000(e)-2000(e)-17, or the Equal Pay Act of 1963, 29 U.S.C., Sec. 206(d)(1)?

2. Whether a valid "red circle" can occur where the discrinatees wage rate is raised, rather than frozen, and there is no showing that the discriminatee would have achieved the increased wage rate in the absence of prior discrimination?

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Plaintiffs-Petitioners,

v.

CITY OF MADISON, a municipal corporation,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, James I. Grann, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 25, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A appended hereto. The opinion of the District Court for the Western District of Wisconsin, not yet reported, appears in Appendix B appended hereto.

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JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 25, 1984. This petition for a writ of certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment—United States Constitution.

Fourteenth Amendment—United States Constitution.

227.01(6) Wis. Stats., (1982).

227.064 Wis. Stats., (1982).

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111.31-111.395, Wis. Stats., (1982).

28 U.S.C. Sec. 1738

29 C.F.R. Sec. 800.146

Title VII of the Civil Rights Act of 1964.
42 U.S.C. Sec. 2000(e)-2000(e)17
Equal Pay Act of 1963, 29 U.S.C., Sec. 206(d)(1)

STATEMENT OF THE CASE

The plaintiffs are male detectives employed by the City of Madison, a municipal corporation located in the State of Wisconsin. On November 11, 1981, the plaintiffs' filed a Complaint in the United States District Court for the Western District of Wisconsin, against the City of Madison, alleging that the plaintiffs had been discriminated against in their employment on the basis of sex, and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000(e) et seq., and the Equal Pay Act of 1963, 29 U.S.C. Sec. 206(d)(1).

Jurisdiction was found in the lower court on the grounds that the plaintiffs' allegations showed the existence of a federal question pursuant to 42 U.S.C. Sec. 2000(e)(f)(3) and 28 U.S.C. Sec. 1343(4).

All of the facts upon which the United States District Court for the Western District of Wisconsin and the United States Court of Appeals for the Seventh Circuit relied upon in rendering their opinions are found in a Stipulated Set of Facts, Appendix C, P. 38.

In early 1972, a study was commissioned by the City of Madison, which recommended among other things, that the rank of detective in the city police force suffer a reduction in pay. At the time of the drafting of the con-

sultant's report, the City of Madison had only one rank of detective and females had not been allowed to compete for that rank.

Instead, females within the police department had the opportunity to progress from the rank of policewoman to policewoman I to policewoman II. Those ranks were not open to males within the department. App. C, P. 46.

On April 25, 1972, the city created the rank of "detective supervisor." App. C, Pp. 39, 45. The rank of detective supervisor included all of those individual males, who prior to that time had achieved the rank of "detective." App. C, P. 45. The rank of "detective" was to be filled by all individuals coming into the police department who sought that rank after April 25, 1972. App. C, P. 45.

According to the city, the rank of "detective supervisor" was to be phased out through attrition. App. C, P. 49. Therefore, the top rank for any individuals entering that branch of the police department was to be "detective." App. C, P. 45.

Detective supervisors were compensated at pay range 5, while the new rank of detective was to be compensated at pay range 3. The rank of policewoman I was compensated at pay range 2. App. C, P. 43. The rank of policewoman II was compensated at pay range 4. App. C, P. 44.

All of the detective supervisors attained their original rank of detective through a competitive examination and interviewing process. App. C, P. 47. The females in the police department on April 25, 1972, had attained their

respective ranks based upon length of time with the force. App. C, P. 47.

All of the plaintiffs in this case are male detectives who attained their rank after April 25, 1972. App. C, P. 39.

On January 1, 1973, all discrimination barring women from all jobs within the police department was abolished. App. C, P. 47. Accordingly, five months later on May 27, 1973, a female was promoted from the rank of policewoman II at pay range 4 to lieutenant at pay range 6. App. C, P. 47.

In October of 1973, over nine months after all discrimination against women within the City of Madison Police Department had ended, the police chief created an "Investigative Services Bureau." App. C, P. 45. The new Bureau was a combination of the former Detective Bureau and Crime Prevention Bureau. App. C, P. 45.

When the Investigative Services Bureau was created in 1973, it included the ranks of detective supervisor, policewoman I, policewoman II, and detective. App. C, P. 45. At that time, the rank of detective supervisor was closed to both males and females. The rank of policewoman II was closed to all males. The rank of detective was open to both males and females. App. C, P. 47.

Despite the city's refusal to allow males to compete for the position of policewoman II, a female, Belle Stephenson, was promoted from the rank of policewoman I to policewoman II on August 29, 1974. App. C, P. 44. This promotion was made without competitive examination, even though all of the male detectives (plaintiffs) had attained their rank through a competitive examination. App. C, P. 45.

At the time the city created the Investigative Services Bureau, those individuals within the ranks of detective supervisor, policewoman II, policewoman I, and detective were all doing the same work.

In August of 1974, the city retitled the rank of policewoman II within the Investigative Services Bureau to detective II. App. C, P. 45. The rank of detective II was still compensated at pay range 4. The position of detective II remained closed to all males. The male detectives within the Investigative Services Bureau continued to be compensated at pay range 3. App. C, P. 48. All those within the Investigative Services Bureau continued to do the same work.

In December of 1975, detective II's Mary Otterson and Mary Ostrander filed sex discrimination complaints with the Equal Rights Division of the Department of Industry, Labor & Human Relations in the State of Wisconsin. App. C, P. 46. The City of Madison denied that it had discriminated against the two females. Both females complained that they were compensated at a lower pay range than the male detective supervisors, while doing the same work.

In August of 1978, the Department of Industry, Labor & Human Relations, an administrative agency in the State of Wisconsin, ruled that the two female complainants had been discriminated against on the basis of sex. App. C, P. 47.

The City chose not to appeal the administrative agency's order and in compliance therewith, promoted both females to the rank of detective supervisor at pay range 5.

In addition, without compulsion the city promoted the three remaining dective II's to the rank of detective supervisor. The promotion of the female policewomen from detective II to detective supervisor adversely affected the plaintiffs' seniority rights. App. C, P. 49. All of the detective II's were paid back pay. App. C, P. 47.

After Belle Stephenson was promoted to the rank of policewoman II in 1974, a detective by the name of Croal filed a complaint of sex discrimination with the Department of Industry, Labor & Human Relations for the State of Wisconsin on October 21, 1974. App. C, P. 48. Detective Croal's complaint was dismissed by the state administrative agency, and the dismissal was subsequently affirmed by a state court. App. C, P. 49.

In February of 1979, the present plaintiffs filed complaints of sex discrimination with the Department of Industry, Labor & Human Relations, and in April of 1979, filed a similar complaint with the United States Equal Employment Opportunities Commission (hereinafter EEOC), App. C, P. 48.

Both Detective Croal and the present plaintiffs received right-to-sue letters from the EEOC and filed timely complaints in the United States District Court for the Western District of Wisconsin. App. C, P. 49.

The cases were consolidated and Croal's complaint was dismissed as barred by the res judicata effect of his

unsuccessful appeal of his action in the state court. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 102 S.Ct. 1883, (1982).

The defendant also moved to bar the present plaintiffs' action on the ground of res judicata. App. A, P. 5. Both the District Court and the Court of Appeals found the doctrines of res judicata inapplicable to the plaintiffs' claims, since the plaintiffs were not parties to Croal's suit in the state court, and in fact, maintained no action in state court. App. A and App. B.

The case was submitted to the District Court Judge on a stipulated set of facts, combined with written briefs and oral arguments of counsel. The lower court judge ruled that the plaintiffs had proved a prima facie violation of 29 U.S.C. 206(d)(1). App. B, P. 26.

The District Court Judge concluded that the promotion of Belle Stephenson on August 29, 1974, was a valid "red circle." This decision was affirmed by the United States Court of Appeals for the Seventh Circuit. App. A and App. B.

The District Court Judge ruled that the defendant had engaged in unlawful sex discrimination commencing on October 24, 1978, when:

> . . . The City of Madison intentionally engaged in an employment practice which this court now determines to be unlawful by discriminating against the plaintiffs on the basis of sex by the promotion of the five

female detective II's from pay range 4 to pay range 5. App. B, P. 31.

Judgment was entered in the lower court on November 5, 1982.

On November 16, 1982, the defendant City of Madison filed a Notice of Appeal with the United States District Court for the Western District of Wisconsin. The defendant chose to appeal the lower court's refusal to bar the plaintiff's claim on res judicata grounds and from that portion of the District Court's final judgment, which held that the defendant had intentionally engaged in an unlawful employment practice.

On November 28, 1982, the plaintiffs filed a cross appeal, appealing the District Court's refusal to grant the plaintiffs back pay and the court's refusal to find that discrimination against the plaintiffs commenced on August 29, 1974.

In a judgment and opinion entered on June 25, 1984, the United States Court of Appeals for the Seventh Circuit affirmed the District Court Judge's finding that the promotion of Belle Stephenson was a valid "red circle." App. A, P. 9. However, the Seventh Circuit reversed the District Court's finding of discrimination, commencing on October 24, 1978.

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ARGUMENT

A. The Decision Of The United States Court Of Appeals For The Seventh Circuit, To Bar Federal Judicial Review Of State Administrative Orders, Decided An Important Question Of Federal Law, Which Has Not Been, Should Be Settled By This Court

1. The Issue Decided By The United States Court Of Appeals For The Seventh Circuit.

The plaintiffs in the case at bar challenged the city's promotion of female employees on two grounds. Number one, the plaintiffs challenged the defendant's right to promote five women to the rank of "detective supervisor," when the administrative order on which the city relied mandated that only two of the five women be promoted.

Secondly, the plaintiffs challenged the city's claim that "compliance" with a state administrative order barred the plaintiffs' right to challenge the effect of that order, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e)-2000(e)-17. (hereinafter Title VII).

The United States Circuit Court of Appeals for the Seventh Circuit, (hereinafter Seventh Circuit), clearly sought to enlist this Court's aid by framing the issue before it as follows:

> A combination of facts, apparently unique, presents us with *a case of first impression* regarding the relationship between federal enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec 2000(e)-

2000(e)-17, and state enforcement of state Fair Employment Laws. (emphasis added). App. A, P. 1.

After purportedly defining the issue before it, the Seventh Circuit Court of Appeals held:

> Once it is clear that the enforcement of Title VII is premised upon the effective enforcement of state laws such as the Fair Employment Act, the only rational resolution of the issue posed by plaintiffs is to hold that reliance on a state agency's order enforcing the right of a protected group to be free from discrimination and employment is an absolute bar to a suit by fellow employees claiming that the action required by the remedial order constitutes a violation of Title VII. App. A, P. 17.

2. The Seventh Circuit's Holding Violates The Due Process Rights Of All Employees Adversely Affected By State Administrative Agency Orders.

The Seventh Circuit's decision denies an adversely affected employee a right to challenge a state administrative order in the federal courts, despite the fact that the aggrieved employee was not party to the state administrative proceeding.[1]

The procedure recommended by the Seventh Circuit for aggrieved parties to challenge state administrative or-

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[1] Although the Seventh Circuit argues that the present plaintiffs could have been parties to the agency's hearing on the female complainants, pursuant to 227.01(6), 227.064,

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ders, is clearly violative of the due process rights of those parties. U.S. Const. Amend. V and XIV.

Initially, there is no requirement in Chapter 227 of the Wisconsin Statutes that an adversely affected employee, who was not a party to the administrative proceeding, be given notice of the agency order. Despite the lack of notice provisions, the affected employee is given only 30 days from the date of the administrative order to intervene in the case and file a petition for review. 227.16 Wis. Stats.

Finally, assuming that somehow the non-party employee whose rights are adversely affected by the order, is both notified of the order within 30 days of its filing, and further, has the acumen to intervene and file a petition for review within the 30 day period, that review of the agency order is limited to a review of the agency record conducted by a state circuit court judge. Sec. 227.20, Wis. Stats., (1982).

In its Decision, the Seventh Circuit clearly stated that the plaintiffs could only challenge the state administrative order through the previously outlined procedure. App. A, P. 22.[2] It is clear that the sole "remedy" accorded the

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and 227.16, Stats., (1982), the plaintiffs would have been provided only 30 days in which to file a petition to review the agency order and said review could only be conducted by a state circuit court judge, without a jury, based upon the previously established agency record. Sec. 227.16 and 227.20, Wis. Stats., (1982).

[2] The Seventh Circuit stated "had plaintiffs taken advantage of *these opportunities,* the claim they now raise could

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plaintiffs by the Seventh Circuit's decision violates their right to due process under the Fifth and Fourteenth Amendments of the United States Constitution.

3. The Seventh Circuit's Decision Limiting The Remedies Available To An Individual Adversely Affected By A State Administrative Agency Order Is In Conflict With The Applicable Decisions Of This Court.

Ignoring for the moment the clear due process deficiencies accorded the plaintiffs by the Seventh Circuit's limitation of available methods to challenge a state agency administrative order, the decision of the Seventh Circuit in the case at bar ignores this court's holding in *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 102 S.Ct. 1883, (1982).

In *Kremer*, this court held that a federal court judge in a Title VII case should give preclusive effect to a decision of a *state court*, upholding a state administrative agency's rejection of an employment discrimination claim

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have been disposed of properly and the state court's decision could have had collateral estoppel effect here. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, (1982)." App. A. Pp. 19-20 (emphasis added).

This statement by the Seventh Circuit is a clear misreading of this court's holding in *Kremer*, where both the majority and dissent agreed that:

> . . . a state agency determination does not preclude a trial de novo in federal court (citation omitted). Congress made it clear beyond doubt that state agency findings would not prevent the Title VII complainant from filing suit in federal court. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 261, 102 S.Ct. 1883, 1900, (1982).

when the state court's decision would be res judicata in the state's own courts. *Kremer,* 102 S.Ct. at 1888. (emphasis added).

The facts in the case at bar are distinguishable from those in *Kremer* for two reasons. Number one, the holding in *Kremer* established preclusive effect only for decisions of state courts, upholding state administrative agency orders. *Id.* In the present case, the decision relied upon by the Seventh Circuit to prohibit the plaintiffs' Title VII action was a decision of a state administrative body, which had not been subjected to judicial review. App. A, P. 4.

Secondly, the facts in *Kremer* indicated that the state court's decision would be res judicata in that state's own courts. *Id.* In the case at bar, the Seventh Circuit ruled that the agency order, stemming from a proceeding to which the plaintiffs were not even parties, precluded the plaintiffs from litigating their own Title VII claim. App. A, P. 23.[3]

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[3] The Seventh Circuit's ruling in this regard is particularly disturbing, in light of its exhaustive discussion of the application of res judicata under 28 U.S.C. Sec. 1738, and the common law of the State of Wisconsin. App. A, Pp. 5, 6.

The defendant had sought to bar the plaintiffs' claim in the District Court on the grounds that Detective Croal's unsuccessful state *court* action had res judicata effect. App. A, P. 5. Based upon the dual application of 28 U.S.C. Sec. 1738, and the Wisconsin common law, the Seventh Circuit concluded that there must:

> . . . be an identity of parties or their privies before a Wisconsin court will apply the judgment from the first suit to bar a second suit. App. A, P. 6 (citations omitted).

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Had the Seventh Circuit chosen to apply the rules of *Kremer* to the facts in the case at bar, it would have concluded that the administrative agency order promoting the females did not have res judicata effect on the plaintiffs in the courts of the State of Wisconsin. Accordingly, it cannot have preclusive effect in a Title VII action.

The Seventh Circuit decision ignores the long recognized relationship between Title VII and state anti-discrimination laws. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 102 S.Ct. 1883, (1982); *Alexander v. Gardner—Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed. 2d 147, (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S .792, 93 S.Ct. 1817, 35 L.Ed. 2d 668, (1973).

A discussion of the procedural interplay between Title VII and state anti-discrimination acts is clearly set forth in *Kremer* and will not be recited for this court in the text of this brief. *Kremer*, 102 S.Ct. at 1890, 1891.

In *Kremer*, the court stated that:

> No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, nor does the Act specify the weight a federal court should afford a final judgment by a state court, if such a remedy is sought. *Kremer*, 102 S.Ct. at 1891.

Despite this clear language, the Seventh Circuit's decision has the effect of not only requiring non parties to seek administrative review of unfavorable state ad-

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In the present case, the plaintiffs were not parties to the females' administrative agency action, and there has been no claim made that they were in privity with those complainants.

ministrative orders, but totally prohibits their right to file a Title VII claim.[4]

This court has long recognized that:

> Initial resort to state administrative remedies does not deprive an individual of a right to a federal trial de novo on a Title VII claim. *Kremer*, 102 S.Ct. at 1895, citing *McDonnell Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 35 L.Ed. 2d 668, (1973) and *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed. 2d 416, (1976).

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[4] In this regard, the Seventh Circuit stated that:

> Under Wisconsin law, it appears that plaintiffs could have become parties to the agency's hearing, Wis. Stats. Sec. 227.01(6), 227.064, and clearly could have obtained judicial review of the agency's actions in state court. Wis. Stats. Sec. 111.37, 227.16.
>
> Had plaintiffs taken advantage of these opportunities, the claim they now raise could have been disposed of properly, and the state's court decision would have had *collateral estoppel effect here*, App. A, Pp. 22-23, (emphasis added) (citation omitted).

In essence, the Seventh Circuit mandated that the sole remedy available to the plaintiffs was for them to challenge the administrative agency's decision in state court. As the Seventh Circuit admits, this would have had collateral estoppel effect and forever barred the plaintiffs from filing a Title VII action, challenging the agency's order. However, even though the plaintiffs did not appear in state court to contest the state order, the Seventh Circuit has ruled that they are "precluded" from challenging the administrative order in the federal courts.

Taking the Seventh Circuit's decision to its logical "conclusion" would have the effect of abolishing Title VII because claimants would be required to challenge state agency orders in the state courts and the state court judgments would have res judicata effect in the federal courts pursuant to *Kremer*. As this court rightly noted in *Kremer*:

> EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decision. *Kremer*, 102 S.Ct. at 1891, fn 7.

Finally, as this court reitterated, in *Kremer*, the doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair" opportunity to litigate the claim or issue. *Kremer*, 102 S.Ct. at 1897; *Allen v. McCurry*, 449 U.S. U.S. 90, 95, 101 S. Ct. 411, 66 L.Ed. 2d 308, (1980); *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210, (1979); *Blonder—Tongue Lab., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 28 L.Ed.2d 788, (1971). Assuming arguendo that the plaintiffs had followed the procedure outlined in the Seventh Circuit's decision, the due precess deficiencies apparent in that procedure would have insured that the plaintiffs would have been denied a "full and fair" opportunity to litigate the issue presently before this Court. *Id.*

4. The Seventh Circuit's Holding That A "Consent Decree" Cannot Be Challenged By An Adversely Affected Non-Party Employee To That Decree Is In Conflict With The Applicable Decisions Of This Court.

Since the Seventh Circuit felt that the case before it represented a situation of "first impression" regarding the relationship between Title VII and state enforcement of fair employment laws, the court argued by analogy that non-parties were precluded from challenging an administrative order because non-parties are precluded from challenging "consent decrees." App. A, P. 20. The Seventh Circuit believed that the administrative order which affected the seniority rights of the non-party plaintiff's was synonomous with a consent decree's effect on non-signatorees.

In the case of *Firefighters Local Union No. 1784 v. Stotts,* this Court held in part that:

> . . . As our cases have made clear, however, and as will be re-emphasized below, Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of its seniority in order to provide a remedy in a pattern or practice suit such as this. . . .
>
> Finally, it must be remembered that neither the union nor the non-minority employees were parties to this suit when the 1980 decree was entered. Hence, the entry of that decree cannot be said to indicate any agreement by them to alter any of its terms. Absent the presence of the Union or the non-minority employees and an opportunity for them to agree or disagree with any provisions of a decree that might encroach on their rights, it seems highly unlikely that the city would purport to bargain away non-minority rights under the then-existing seniority system. 104 S.Ct. 2576, 2586, (1984).

Accordingly, the *Stotts* case stands for the proposition that a consent decree can be modified when it affects the seniority rights of employees who were not signatorees to it. That is certainly akin to the position of the plaintiffs in the present case, who seek to modify the application of a state agency order, which affects their seniority rights.

The Seventh Circuit tried in vain to distinguish *Stotts* on the ground that the promotion of the females in the present case pursuant to the state agency order had no effect on the non-party plaintiffs' seniority rights. App. A, P. 19 fn. 5. A simple reading of the stipulated set of facts in this case clearly indicates that the Seventh Circuit's purported factual distinction between this case and *Stotts* was without merit. App. C, Pp. 49-50.

At the very least, the Seventh Circuit's confusion on this issue indicates a conflict among the circuits. *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, (6th Cir., 1980); *Dennison v. City of Los Angeles Dept. of Water & Power*, 658 F.2d 694, (9th Cir., 1981); *United States v. Jefferson County*, 720 F.2d 1511, (11th Cir., 1983).

B. The Opinion For The United States Court Of Appeals For The Seventh Circuit Holding That A Plaintiff In A Title VII Case Must Prove That A Party Promoted By a Remedial State Agency Order Would Not Have Achieved Said Promotion In The Absence Of Prior Discrimination Is In Conflict With Applicable Decisions Of This Court And Constitutes A Shifting Of The Burden Of Proof In A Title VII Case.

1. The Burden Of Proof In Title VII Actions.

It is Hornbook law in Title VII cases that the plaintiff has the burden of proving a prima facie case of discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207, (1981); citing *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 35 L.Ed.2d 668, (1973).

After the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant to "articulate some legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp*, 93 S.Ct. at 1824.

2. The Seventh Circuit's Decision Fails To Shift The Burden From The Plaintiffs, After The Plaintiffs Proved A Prima Facie Case Of Discrimination.

The defendant conceded at the District Court level that the plaintiffs had proven a prima facie case of

sex discrimination. App. B, P. 26. Accordingly, it then became the duty of the defendant to provide proof of a non-sex based reason for promoting the five females in "compliance" with the state agency order mandating the promotion of only two females.

The plaintiffs argued that the city as the defendant bore the burden of proving that all of the females would have obtained the rank of detective supervisor "but for" prior discrimination by the police department. App. A, P. 22. To this argument, the Seventh Circuit responded as follows:

> Although the basis for the agency's action is not in the record and plaintiffs have offered no reason to suspect the ability of the women to become detectives absent discrimination, we do not need to examine the sufficiency of the proof presented to the agency. *Id.*

Further, after admitting that the defendant failed to prove that the five females would have been promoted "but for" prior discrimination, the Seventh Circuit concluded that:

> We do not agree that anything in Title VII commands us to encourage an employer faced with an order to make whole several members of a group of discriminatees to litigate the rights of other members of that group. App. A, P. 22.

Since promotion of the females affected the plaintiffs' seniority rights the City was obliged to prove that each female had suffered the impact of the prior discrimination. App. C, Pp. 49-50.

This court has recently stated:

> . . . mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice

had an impact on him. *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. at 2588; citing *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444, (1976); *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, (1977).

In the case at bar, the Seventh Circuit countenanced the city's action of promoting the three females who were not subject to the agency order, despite the fact that there was absolutely no proof that the police department's prior discriminatory practice had an impact on them as individuals. See generally, *Firefighters Local Union No. 1784,* 104 S.Ct. 2588, 2589, 2590.

Accordingly, the Seventh Circuit's handling of this issue ignored prior decisions of this Court on that issue.

C. The Opinion For The United States Court Of Appeals For The Seventh Circuit, Holding That The Promotion Of Belle Stephenson Was A Valid "Red Circle" Is In Conflict With Applicable Decisions Of This Court.

The plaintiffs challenged the defendant's promotion of female Belle Stephenson to the rank of policewoman II more than one and one-half years after all discrimination in the city police department had ended. The rank of policewoman II was banned to all males.

The Seventh Circuit concluded that:

> While we recognize that this time in grade promotion is not the typical form in which a red circle is found, we think that in the typical situation presented by this case, the promotion served the promotion of a red circle and was legitimate. App. A, P. 8.

This is despite the fact that the city failed to provide any justification whatsoever for its promotion of Belle Stephenson.

The city's actions in regard to Belle Stephenson's promotion do not meet the criteria for a valid red circle. The code of federal regulations states as follows:

> . . . Where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be red circled in order to comply with the Act. To allow this would only continue the inequities which the Act was intended to cure. 29 C.F.R. 800.146.

In the present case, the City did not "red circle" Belle Stephenson's salary at pay range 2. Instead, it promoted her and raised her salary to range 4, a range barred to all males wthin the police department, after the city admits all discrimination against females in the police department had ended.

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CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the opinion of the Seventh Circuit.

Respectfully submitted,

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August 17, 1984

APPENDIX A

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Nos. 82-2887, 82-3098

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JOHN F. STIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFROY, DENNIS A. GERFEN, LEMUEL B. GRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs-Appellees-Cross-Appellants,

v.

CITY OF MADISON, a municipal corporation,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 807—John C. Shabaz, *Judge*

ARGUED DECEMBER 6, 1983—DECIDED JUNE 25, 1984

Before Cummings, *Chief Judge,* PELL and WOOD, *Circuit Judges.*

PELL, *Circuit Judge.* A combination of facts, apparently unique, presents us with a case of first impression regarding the relationship between federal enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2000(e)-17, and state enforcement of state fair employment laws. This appeal requires that we review the district court's conclusion that defendant violated the federal rights of recently promoted male detectives when it complied with an order by the Equal Rights Division of the Wisconsin Department of Industry, Labor, and Human Relations (DILHR) requiring defendant to raise the salaries of female detectives to the level paid to the more senior male detectives. Defendant claims that the court erred in finding sex discrimination, while plaintiffs urge that the court erred in not finding that the discrimination began at a earlier date and in refusing to award back pay.

I. FACTS

Until 1972 the City of Madison hired only males as police "officers," and allowed only males to compete for positions as detectives. Women were only employed as policewomen, policewoman I, and policewoman II. Detectives were compensated at Pay Range 5, while policewomen II were compensated at Pay Range 4. Police officers seeking to become detectives had to pass a competitive examination, while females obtained the rank of policewomen II by serving for a specified period of time on the force. Policewomen were employed exclusively in the Crime Prevention Bureau and were not allowed to attend police training classes or perform patrol duties.

Several events in 1972 altered the structure of the Madison police department. In that year Title VII of the

Civil Rights Act of 1964 was amended to cover municipal employees. Equal Employment Act of 1972, Pub. L. No. 92-261, 1972 U.S. Code Cong. & Ad. News (86 Stat.) 122. In addition, the city implemented recommendations made by a consultant in 1971, which included lowering the pay of detectives to Pay Range 3 to eliminate some of the pay differential between detectives and patrol officers. The new pay only applied to entry level detectives, all existing detectives were "grandfathered" at Pay Range 5 and retitled "detective supervisors." For the sake of clarity we will refer to those officers promoted after the new pay structure was adopted, and consequently paid at Pay Range 3, as "detectives." Those paid at Pay Range 5 will be referred to as "detective supervisors."

In 1973 a new police chief combined the Detective Bureau and the Crime Prevention Bureau to form the Investigative Services Bureau. The new bureau employed detectives, detective supervisors, and policewomen. In 1974 all policewomen II's were retitled "detective 2." Consequently, on that date, the bureau contained detectives, paid at Pay Range 3, detectives 2, paid at Pay Range 4, and detective supervisors, paid at Pay Range 5. All of the various detectives performed the same work. The distinguishing characteristics were the date the officer became a detective and the detective's sex. The city intended to phase out the position of detective 2 and detective supervisor through attrition and promotion.

Plaintiffs, male detectives, point to two events to support their claim of sex discrimination. The first is the promotion of Belle Stephenson to policewomen II (later retitled detective) in 1974 after three years of satisfactory service as policewomen I. The second oc-

curred in 1975 when Mary Otterson and Mary Ostrander, both detectives 2, filed a discrimination complaint with the DILHR. The city denied that it was guilty of discrimination and contested the charges. After conducting a hearing DILHR ordered the city to classify the women as detective supervisors and pay back pay. The city complied with the order, and in fact reclassfied all detectives 2 as detective supervisors.

II. PREVIOUS LITIGATION

On October 21, 1974, Detective Croal (Pay Range 3) filed a complaint of sex discrimination with DILHR, alleging that the promotion of Stephenson to detective 2 (Pay Range 4) was an act of sex discrimination. After a hearing on the matter the department examiner recommended dismissal of Croal's complaint. On November 10, 1978, the Labor and Industry Review Commission dismissed the complaint. Croal filed a petition for review in Dane County Circuit Court. On February 27, 1980, the court affirmed DILHR's dismissal of Croal's complaint. Croal voluntarily dismissed his appeal from this decision as it had been untimely filed.

In February of 1979, plantiffs filed complaints with DILHR. In April, 1979, they filed complaints with the United States Equal Employment Opportunities Commission (EEOC). The EEOC issued an initial determination of no probable cause on plaintiffs' complaint in June, 1979. Both Croal and plaintiffs received right-to-sue letters and filed actions in the district court. The cases were consolidated and Croal's complaint was dismissed as barred by the res judicata effect of his unsuccessful action in state court. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

III. DECISION OF THE DISTRICT COURT

The district court considered and rejected plaintiffs' claim that the promotion of Stephenson to policewomen II after the department had officially ended sex discrimination violated Title VII. The court found that the promotion was a legitimate "red circle" as defined later herein, as it protected Stephenson's seniority and pay in the department. The court, however, found that the department's reliance on the DILHR order was not a defense to a claim that promotion of the women to detective supervisors violated Title VII and the Equal Pay Act, 29 U.S.C. § 206(d).[1] The court, nonetheless, refused to grant plaintiffs' back pay. Defendant claims that the court erred in rejecting its claim that reliance on the DILHR order is a defense to the sex discrimination claim, while plaintiffs claim that the court erred in not finding that the discrimination began with Stephenson's promotion and not ordering back pay from that date.

IV. RES JUDICATA

We first consider whether plaintiffs are in any way precluded from litigating their claim concerning Stephenson's promotion by Detective Croal's unsuccessful efforts. Under 28 U.S.C. § 1738 "[t]he . . . judicial proceedings of any court of any such state . . . shall have the same full faith and credit in every court within the United States and its territories and possessions as they have

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[1] The parties agreed that the district court should treat the Equal Pay Act claim and the Title VII claim as "essentially the same." Title VII and the Equal Pay Act are to be construed "in harmony," Orahood v. Board of Trustees, 645 F.2d 651, 654 (8th Cir. 1981), and in a case such as this we will treat the two statutes as proscribing essentially the same conduct.

by law or usage in the courts of such state." We therefore must give "the same preclusive effect to state court judgments that these judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). Under *Kremer*, which held that a state court judgment on a state fair employment law claim should be given preclusive effect in a federal Title VII action if it would preclude a second state proceeding, it is clear that Detective Croal could not relitigate his claim in federal court. Defendant seeks to extend this preclusive effect to plaintiffs, who were not parties to Croal's suit and have not maintained an action in state court.[2]

The most obvious problem in applying res judicata to plaintiffs' claim is the requirement that there be an identity of parties or their privies before a Wisconsin Court will apply the judgment from the first suit to bar a second suit. *Barbian v. Linder Brothers Trucking Co.*, 106 Wis. 2d 291, 296, 316 N.W.2d 371, 374 (1982); *Leimert v. McCann*, 79 Wis. 2d 189, 194, 255 N.W.2d 526, 529 (1977). Defendant cannot claim that Croal and plaintiffs are really the same people as they clearly are not. Defendant does contend, however, that plaintiffs should be treated as being in privity with Croal because their rights stem from being detectives, just as Croal's rights stemmed from being a detective.

Defendant misconstrues the concept of privity. "The Wisconsin Supreme Court defines privies as those who

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[2] Defendant admits that under any view of the law those claims involving the promotion of detectives 2 to the rank of detective supervisor, which occurred after Croal filed his complaint, cannot be barred by Croal's litigation.

succeed to the ownership of property or some right or interest therein under one of the parties to the litigation." *Falk v. Falk Corp.*, 390 F. Supp. 1276, 1282 (E.D. Wis. 1975). In *Falk* the decedent had unsuccessfully litigated his right to designate someone other than his first wife as beneficiary of his deferred compensation plan. After decedent's death his second wife tried to relitigate his claim that he had the power to designate her as beneficiary. The court was clearly correct in holding that she was in privity with her late husband as her right to be designated beneficiary was dependent upon his power to so designate her. Contrary to defendant's claim, *Falk* is not analogous to the present situation. Plaintiffs' situation may be factually identical to Croal's, but they did not derive their positions as detectives from him nor did they obtain their right not to be discriminated against on the basis of sex from Croal. Croal's existence is irrelevant to the validity of plaintiffs' claim and he had no power to bind plaintiffs through his actions. Furthermore, there is no evidence that plaintiffs were in fact, involved in Croal's suit. In short, there is no reason to believe that a Wisconsin court would succumb to the temptation to treat Croal's suit as a class action after the fact, and we may not do so ourselves. Plaintiffs were not in privity with Croal and cannot be bound by his unsuccessful litigation.

V. PROMOTION OF BELLE STEPHENSON

Belle Stephenson began working as a policewoman in 1958. She worked her way up the available ranks and then resigned in 1965. In 1966 she rejoined the force and began to work her way back up to policewoman II. The depart-

ment officially ended sex discrimination in 1973, but promoted Stephenson to policewoman II in 1974 although that position was not open to males. Plaintiffs claim that this promotion was an act of sex discrimination as they were not eligible for a similar promotion, which carried with it a raise in pay. The district court rejected this claim after fnding that failure to give Stephenson her time in grade promotion because sex discrimination had ended would have placed the burden of sexual equality on a victim of discrimination. The court concluded that the promotion was therefore a legitimate "red circle."

Plaintiffs argue that a promotion cannot be a legitimate red circle. While we recognize that this time in grade promotion is not the typical form in which a red circle is found, we think that in the atypical situation presented by this case the promotion served the purpose of a red circle and was legitimate.

The practice of red circling is common when remedying discrimination that has kept minority groups in low paying jobs that present no opportunity for advancement. In this situation the employer may—and in many cases must—maintain, or red circle, the victimized employees' salary when they transfer to a lower paying job that provides the training necessary for advancement. *Swint v. Pullman-Standard,* 539 F.2d 77, 100 (5th Cir. 1976), *appeal from remand,* 624 F.2d 525 (1980), *reversed and remanded on other grounds,* 456 U.S. 273 (1982); *Watkins v. Scott Paper Co.,* 530 F.2d 1159 (5th Cir. 1976), *cert. denied,* 429 U.S. 861; *Rogers v. International Paper Co.,* 510 F.2d 1340 (8th Cir. 1975), *vacated on other grounds,* 423 U.S. 809; *United States v. Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971). Red circling allows the employee

to achieve a position he would already have attained but for the discrimination without being forced to suffer any economic loss. The rationale is that the victim of discrimination should not bear the costs associated with remedying the situation.

Although the promotion of Stephenson to policewoman II does not appear to be a red circle in the customary sense in that the department went beyond maintaining her salary and gave her a raise, the facts in this case support this extension of the usual application of a red circle. During the period when the police department discriminated on the basis of sex, a policewoman such as Stephenson was not only denied promotions, she was also denied the opportunity to acquire the skills necessary to perform more demanding police work. Policewomen, however, were allowed to reach Pay Range 4 through length of service, rather than through examinations as the men did. Stephenson was just shy of earning her time in grade promotion—in fact she had already once "made the grade" but had resigned and then had begun again—when discrimination officially ended. Removing the official barriers did not place Stephenson in the same position she would have occupied had she never been subject to discriminaton to begin with, however, but rather left her lacking the skills and experience any male would have acquired in the same time and now she also lack the benefit of her soon due promotion resulting from her length of service. The department, by granting Stephenson her promotion, recog.ized her length-of-service benefit earned by her while not placing her in the position she would have occupied but for the discrimination.

Because we find that Stephenson's promotion was a red circle, we need not address defendant's remaining

arguments concerning the procedural bars to plaintiffs' recovery on this theory.

VI. PROMOTION OF DETECTIVE 2 TO DETECTIVE SUPERVISOR

The final issue we must confront is also the most difficult, did the district court err in holding that reliance on a state agency's order cannot be a defense to a Title VII claim? The court, citing our decision in *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974), ruled that reliance on a state law can never be a defense to a claim of sex discrimination. We think that the court read *Williams* more broadly than the opinion warrants and that a more thorough analysis of the relationship between state enforcement of state fair employment laws and federal enforcement of Title VII is required before the issue can be solved.

The Civil Right Act of 1964 contains two provisions regarding the effect of the new federal law on state laws. Section 708 of Title VII states:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful-employment practice under this subchapter.

42 U.S.C. § 2000e-7.

Similarly, Section 1104 of Title XI, which contains miscellaneous provisions of the Act, provides that:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Con-

> gress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provisions thereof.

42 U.S.C. § 2000h-4.

The legislative history, case law, and structure of the enforcement provisions of Title VII make clear that Congress intended that the states play an active role in ending discrimination and that these two "savings" provisions should not be construed to undermine state efforts. Enforcement of Title VII is pemised on the belief that the states should be given the first opportunity to deal with cases of discrimination. Section 706 of Title VII requires that when the state within which the employment discrimination took place has a state law prohibiting the unlawful employment practice and an agency authorized to enforce the law, then the complainant must pursue state remedies and allow the state sixty days to obtain relief before filing charges of violation of Title VII with EEOC. 42 U.S.C. § 2000e-5(c). Commenting on this provision, Senator Humphrey stated:

> We recognize the good sense of permitting the appropriate State agencies ample time to resolve disagreements arising under Title II and IV and VII, in particular, through voluntary conciliation mediation. We recognize that many States already have functioning antidiscrimination programs to insure equal access to places of public accommodation and employment opportunity. We sought merely to guarantee that these States—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience

> without premature interference by the Federal Government.
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> * * *
>
> In instances were the States are unable or unwilling to provide this protection, the Federal Government must have the authority to act. This is the formula which we sought to implement.

110 Cong. Rec. 12724-25 (1964) (statement of Sen. Humphrey). Senator Humphrey termed the enforcement provisions of Title VII a "States rights bill" and a "States responsibilities bill." *Id.* Senator Clark commented that: "Title VII meshes nicely, logically, and coherently with the State and city legislation already in existence." 110 Cong. Rec. 7205 (1964) (statement of Sen. Clark).

Judicial interpretations bear out this reading of Title VII. In *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980), the Court ruled that Section 706(k), which allows a court to grant a reasonable attorney's fee to a prevailing party "[i]n any action or proceeding" under Title VII, 42 U.S.C. § 2000e-5(k), authorized an award of fees for work done in prosecuting an employment discrimination claim through the required state proceedings even when no federal proceedings take place. In holding that state proceedings are part of an action of proceeding under Title VII the Court considered the role the states play in furthering the policy of Title VII and concluded that:

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.

447 U.S. at 65, *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (§ 706 of Title VII is intended to screen from the federal courts those cases that could be settled through state or local enforcement); *Alexander v. Garner-Denver Co.*, 415 U.S. 36, 48 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.").

Congress clearly intended to encourage state protection of civil rights in the area of employment discrimination, without abandoning the power to use federal enforcement mechanisms when state remedies prove ineffective. Section 708 of Title VII and Section 1104 of Title XI were designed to accomplish this goal by saving those state laws that were consistent with the goals of Title VII while invalidating those that hindered protection of civil rights. With this in mind, we will turn to examine the district court's resolution of plaintiff's claim.

The district court read Section 708 and our decision in *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974), as eliminating reliance on any state law as a defense in a Title VII action. As we have already observed, however, Section 708 does not preempt all state laws, only those that are inconsistent with the goals of Title VII. *Williams* is consistent with this proposition. In *Williams* the employer relied on the Illinois Female Employment Act to justify discrimination against female employees. We rejected this defense because "protective" legislation such as the Illinois Female Employment Act, which prohibited women from working more than forty-eight hours a week or nine hours a day, acts to perpetuate

sex discrimination in direct contravention of the policy behind Title VII and therefore is not saved by Section 708 or Section 1104. *Williams,* 492 F.2d at 404. *Williams,* however, does not stand for the proposition that all state legislation regarding sex discrimination is to be discarded. Scrapping state laws that seek to eliminate, rather than perpetuate, discrimination is not required by Title VII and would totally undermine the dual enforcement system envisioned by Congress.

Several courts have noted the distinction between protective legislation, which is simply legislated discrimination, and state fair employment laws, which are an integral part of Title VII's enforcement scheme. *See LeBlanc v. Southern Bell Telephone and Telegraph Co.,* 333 F.Supp. 602, 609 (E.D. La. 1971), *aff'd,* 460 F.2d 1228, *cert. denied,* 409 U.S. 990 (1972) (Title VII intended to save state antidiscrimination laws, but not protective legislation); *Rosenfeld v. Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971); *Local 246, Utility Workers Union of America v. Southern California Edison Co.,* 320 F. Supp. 1262 (C.D. Ca. 1970). In a related area several courts have held that the Employee Retirement Income Security Act (ERISA), which explicitly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. §1144, does not prohibit application of state antidiscrimination laws to employee benefit plans. Despite the explicit preemption the courts have balanced this provision against ERISA's statement that: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 144(d). After examining the history and structure of

Title VII the courts have determined that "the federal scheme contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory scheme." *Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations,* 599 F.2d 205, 210-11 (7th Cir. 1979), *cert. denied,* 444 U.S. 1013 (1980); *see also Westinghouse Electric Corp. v. Maryland Commission on Human Relations,* 520 F. Supp. 539 (D. Md. 1981). In both of these cases the courts concluded that the need for enforcement of state fair employment laws in the enforcement scheme of Title VII outweighed the need for uniform regulation of employee benefit plans.

It is clear to us, then, that the district court's analysis was too simplistic in accepting a *per se* approach to invalidating state employment laws. A proper analysis requires that the state law in question be examined to determine whether it is the type of law Congress expected to act as the first line of offense against employment discrimination or whether it itself is a cause of discrimination.

The city here promoted the female detectives to detective supervisors after unsuccessfully challenging charges of discrimination filed with DILHR. DILHR acts pursuant to the Wisconsin Fair Employment Act. Wis. Stat. §§ 111.31-111.395. The Fair Employment Act prohibits employment discrimination on the basis of sex, Wis. Stat. § 111.321, and authorizes DILHR to conduct hearings and issue orders necessary to effectuate the purpose of the Act, Wis. Stat. § 111.39. In many respects the Fair Employment Act is identical to Title VII. In some areas, not pertinent here, the Act offers protection to groups not

covered by Title VII. The one difference between the two pieces of legislation that is worth noting is in the date each began to prohibit sex discrimination against municipal employees. The Fair Employment Act proscribed this conduct in 1961,[3] while Title VII did not extend protection to these employees until 1972. Although this difference may account for the events that led to this law suit—DILHR was able to take action because the city's discriminatory policy violated state law, but the city's policy did not violate Title VII until 1972, at which point it had grandfathered the existing detectives at the higher pay for nondiscriminatory reasons—it does not alter the validity of the Fair Employment Act. It would be ironic in-

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[3] Until 1975 the Fair Employment Act did not specifically include the State or its agencies in the definition of "employer," but rather simply excluded "social club and fraternal society" employers from its proscriptions. In 1975 the Wisconsin Supreme Court ruled that this negative definition of employer did not include the State or its agencies, and that the prohibition against employment discrimination by any "person" meant only those entities defined as a "person" under Wis. Stat. 990.01(26), which included "all partnerships, associations, and bodies politic and corporate." The Supreme Court held that the State is not both politic *and* corporate and so is not included in the definition of "person." *State ex rel. Department of Public Instruction v. ILHR,* 68 Wis. 2d 667, 229 N.W.2d 591 (1975). In 1975 the definition of employer was amended to include the State and its agencies. Wis. Laws 31 (1975). None of this affects the Fair Employment Act's applicability to municipal employers such as defendant. In a case involving defendant the Wisconsin Supreme Court held that a municipality is included within 990.01(26) as it is both a body politic and corporate. *City of Madison v. Hyland,* 73 Wis. 2d 364, 243 N.W. 2d 422 (1976). The Act was amended in 1961 to cover sex discrimination. Wis. Laws 581 (1961). There appears to be no question, then, that DILHR was justified in pursuing the females' claim against the city.

deed to hold that Congress, which never indicated any intention of requiring that state fair employment laws be identical to Title VII, intended to invalidate state laws that extend their protection into more work places than does Title VII. In protecting municipal employees at an earlier date the Fair Employment Act did not become "inconsistent" with Title VII, nor did it require "the doing of any act which would be an unlawful employment practice" under Title VII, and we cannot agree with the district court that it suffers the same fate as discriminatory protective legislation under Sections 708 or 1104.[4]

Once it is clear that the enforcement of Title VII is premised upon the effective enforcement of state laws such as the Fair Employment Act, the only rational resolution of the issue posed by plaintiffs is to hold that reliance on a state agency's order enforcing the right of a protected group to be free from discrimination in employment is an absolute bar to a suit by fellow employees claiming that the action required by the remedial order constitutes a violation of Title VII.

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[4] The EEOC apparently views the work done by DILHR as consistent with the goals of Title VII. The Commission designates state agencies that qualify under 706(c) of Title VII as "706 Agencies." 29 C.F.R. § 1601.70(a) (1983). The Commission also certifies certain 706 Agencies that have performed well in the past, and "the effect of such certification is that the Commission shall accept the findings and resolutions of designated 706 Agencies in regard to cases processed under contract with those agencies . . . without individual case-by-case substantial weight review by the Commission." 29 C.F.R. § 1601.75 (1983). The Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations is a 706 Agency, 29 C.F.R. § 1601.74 (1983), certified by the Commission, 29 C.F.R. § 1601.80 (1983).

Although we have located no cases dealing with reliance on a state agency's remedial order, several cases have confronted analogous claims by employees adversely affected by consent decrees entered into by their employers and a second group of employees. In *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980), black employees complained in 1966 that racial discrimination excluded them from the lines of promotion. A settlement was reached that granted them access to the lines of promotion, but did not grant them retroactive seniority. In 1971 female employees complained about sex discrimination. Once again, a conciliation agreement was reached, but this time the company granted the women retroactive seniority. The agreement was signed by the EEOC and approved as a consent decree by the court in 1973. The black employees, who were adversely affected by the grant of seniority to the women, complained that this was an act of race discrimination. The court recognized that the black employees had been hurt by the consent decree, but noted that the same could be said of any resolution of a Title VII claim that included a grant of retroactive benefits. To allow consent decrees to be attacked by disappointed third parties would undermine the employer's motivation to settle discrimination cases and would reopen old claims every time a new group of victims was made whole. Accordingly, the court held that absent bad faith, "the conciliation agreement and consent decree cannot form the basis of a valid Title VII action." *Id.* at 1237.

In *Dennison v. City of Los Angeles Department of Water and Power*, 658 F.2d 694 (9th Cir. 1981), non-minority employees unsuccessfully objected to the district court's approval of a consent decree that established an

affirmative action program for minority employees. The non-minority employees then filed suit seeking compensation for the harm caused by the consent decree. The Ninth Circuit rejected plaintiffs' claim for two reasons; first, the suit constituted an impermissible collateral attack on the decree, and second, allowing non-minority employees to sue for compensation would place the city in the impossible situation of facing suit by minority employees if it fails to correct past discrimination and facing suit by non-minority employees if it corrects past practices. Similarly, in *Stotts v. Memphis Fire Department,* 679 F.2d 541 (6th Cir. 1982), *rev'd on other grounds,* 52 U.S.L.W. 4767 (U.S. June 12, 1984), the Sixth Circuit reasoned that recognition of a consent decree that rectifies past discrimination against minority employees as an actionable wrong against non-minority employees would place employees in an untenable position. The court accordingly held that "a reasonable consent decree does not adversely affect *any* legally protected interest of a non-minority." *Id.* at 558[5] (emphasis in original). *See also* ***Freeze v.***

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[5] The recent decision by the Supreme Court in *Stotts* does not contradict this position. In *Stotts* the city and union objected to the district court's modification of a consent decree. The decree auhorized an affirmative action program for hiring minority employees, but said nothing about layoffs. When economic problems forced the city to make layoffs, it chose to follow its existing seniority system. Minority employees sought relief from the court. The court read the decree as authorizing protection for minority employees in this situation. The Supreme Court disagreed, holding that the decree did not authorize the court to enjoin the operation of the city's bona fide seniority system and that the court had no power to modify the decree over the city's objection when there had been

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ARO, Inc., 503 F. Supp. 1045 (E.D. Tenn. 1980) (consent decree settling claims of black employees cannot be the basis for Title VII suit by white employees). *But cf. United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983) (district court denied white firefighters' motion to intervene in Title VII suit between black firefighters and county as untimely; affirmed on appeal as denial did not prejudice white firefighters as they could still challenge action taken pursuant to decree through their own Title VII suit. The court noted that the question whether county's reliance on decree to justify action constituted a defense was "difficult" and did not rule on it.)

A state agency's order that rectifies discrimination should no more be the basis for a Title VII suit than a consent decree entered into during a Title VII suit.[6] As

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no proof that the minority employees had each been a victim of actual discrimination. The Court did not hold that non-minority employees can attack a consent decree that remedies the effects of proven discrimination. In the case before us the women were clearly the victims of discrimination and the city agreed to the relief provided. Furthermore, *Stotts* involved seniority rights, which cannot be awarded to one employee without adversely affecting the rights of other employees, while the male detectives here lost nothing when the city remedied the discrimination against the women.

[6] Plaintiffs claim that *McCall Printing Corporation* has been overruled by W. R. Grace & Co. v. Local Union 795, International Union of the United Rubber, Cork, Linoleum and Plastic Workers, 103 S. Ct. 2177 (1983), in which the Court held that an employer who enters into a consent decree that conflicts with a collective bargaining agreement has to bear the expense of compliance with both. The Court reasoned that the company, by voluntarily entering into two agreements, had created its own dilemma. The Court, citing *McCall Printing Corporation* and *Dennison*, specifically stated that it was not dealing

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an initial matter it would mean that an employer who settles the dispute at the state level is in a much worse position than one who litigates until the federal level and then settles. In addition, acceptance of plaintiffs' position would place the police department in the untenable position envisioned in *Dennison* and *Stotts;* the department could obey the remedial order and face Title VII liability or ignore the order and face sanctions. We do not think that it is reasonable to expect the department, faced with this situation, to solve it by simply paying all detectives at Pay Range 5.

As in *McCall Printing Corporation, Dennison,* and *Stotts,* the relief the department was ordered to provide to the women was reasonable. The policewomen were clearly the victims of sex discrimination for an extended period of time and were entitled to be placed in the position they would have occupied but for the discrimination. This relief is authorized by the Fair Employment Act, Wis. Stat. § 111.39, and comports with relief available to victims of sex discrimination under Title VII. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 364 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 764 (1976). Plaintiffs here have less to complain of than employees affected by a grant of seniority to past victims of discrimination. In that situation the relief awarded the victims directly affects the value of other employees' seniority, yet that is not enough to make

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with a judicial order providing "relief to discriminatees under Title VII or other law." *Id.* at 2184 n.9. It is clear, then, that the Supreme Court did not consider the situations analogous and did not overrule *McCall Printing Corporation.*

a retroactive grant of seniority an improper remedy. *Franks*, 424 U.S. at 775. Here the salaries received by the new male detectives were not lessened by the raise given to the women.

Plaintiffs raise several complaints that, they argue, undercut the department's reliance on DILHR's order in this case. First, plaintiffs complain that the department promoted all five women when only two had filed complaints with the agency, and the promotion of three of the women therefore cannot have been due to the remedial order. We do not agree that anything in Title VII commands us to encourage an employer, faced with an order to make whole several members of a group of discriminatees, to litigate the rights of other members of that group. To adopt this position would be to thwart the goal of Title VII of encouraging settlement of complaints through voluntary compliance. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The department's reliance on the remedial order is not undercut by its voluntary action concerning those women who had not yet filed complaints but who had equally meritorious claims of discrimination.

Plaintiffs also argue that DILHR was not justified in ordering the remedial action for the actual claimants in this case as there was no showing that the women would in fact have become detectives had there been no discrimination. Although the basis for the agency's action is not in the record and plaintiffs have offered no reason to suspect the ability of the women to become detectives absent discrimination, we do not need to examine the sufficiency of the proof presented to the agency. Under Wis-

consin law it appears that plaintiffs could have become parties to the agency's hearing, Wis. Stat. §§ 227.01(6), 227.064, and clearly could have obtained judicial review of the agency's actions in state court, Wis. Stat. §§ 111.37, 227.16. Had plaintiffs taken advantage of these opportunities the claim they now raise could have been disposed of properly and that state court's decision would have had collateral estoppel effect here. *Kremer v. Chemical Construction Co.*, 456 U.S. 461 (1982). We see no more reason to permit a collateral attack on the agency's order than we do to permit a collateral attack on a consent decree.

In conclusion, we hold that the purposes of Title VII will best be served by showing due deference to a state agency's enforcement of a state fair employment law. In this case we hold that the department did not violate Title VII by complying with DILHR's order remedying sex discrimination. We also note that plaintiffs have not really suffered at the hands of DILHR. Plaintiffs are in Pay Range 3 not because of their sex but because they had the misfortune to become detectives after the department decided to make the position less lucrative for all newcomers. In fact, until DILHR ordered the department to promote the women, only men were paid at Pay Range 5. In this situation the department is not "getting away with" sex discrimination behind the facade of compliance with the remedial order.

For the reasons stated in this opinion the decision of the district court finding that the promotion of Belle Stephenson was not discriminatory is AFFIRMED, and the court's finding that the reclassification of detective 2 to

detective supervisors was discriminatory is REVERSED. The parties shall bear their own costs.

Teste:
A True Copy:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

DECISION AND ORDER

81-C-807

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JOHN F. SIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFEN, LEMUEL B. GRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs,

v.

CITY OF MADISON,
a municipal corporation,

Defendant.

Plaintiffs are male detectives with the City of Madison Police Department. They have filed a complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and under the Equal Pay Act, 29 U.S.C. § 206(d), alleging that defendant City of Madison has paid four female employees at a higher rate of compensation for substantially identical work.

The parties have agreed to an extensive stipulated statement of facts, which the Court adopts in full as its Findings of Fact.

CONCLUSIONS OF LAW

1. Jurisdiction and venue are proper in this Court.

2. As both parties concede, the analysis of plaintiffs' Title VII claim is "essentially the same" as plaintiffs' claim under the Equal Pay Act.

3. Both parties also agree that plaintiffs have established a *prima facie* violation of 29 U.S.C. § 206(d) (1); that is, plaintiffs receive less pay than certain female police officers for equal work.

4. Once plaintiffs establish a *prima facie* case, the parties agree that the burden shifts to the defendant employer. It may establish, as affirmative defenses, four possible exceptions to the equal pay requirement:

> . . . where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. § 206(d) (1).

5. Defendant relies on the fourth exception to the equal pay requirement. It argues that it "red-circled" on at least two occasions, and in neither case was the decision impermissible. For the sake of clarity the Court will recount the events leading to the present disparity in wages:

A) Prior to 1972, the relevant pay ranges appeared as follows:

Pay Range	*Position*
4	Policewoman II
5	Detective

B) As a result of a consultant's report in 1971, the detective position was lowered to range 3. However, incumbent detectives at range 5 did not suffer a loss in pay. Instead, they were "grandfathered" at range 5. The position was renamed "Detective Supervisor." All detectives promoted after that time, however, would be paid at range 3. Thus the pay scale appeared as follows:

Pay Range	*Position*
3	Detective
4	Policewoman II
5	Detective Supervisor

C) After the force was substantially reorganized in 1973, defendant changed job titles to remove sexual designation in 1974. Women performing detective work with three years of experience had their job titles changed from Policewoman II to Detective II. The pay scale was then as follows:

Pay Range	*Position*
3	Detective
4	Detective II
5	Detective Supervisor

D) Mary Otterson, one of four officers in the Detective II position, filed a complaint with the Equal Rights Division of the Department of Industry, Labor and Human Relations (DILHR) in 1975, alleging sexual discrimination.

On August 1, 1978, DILHR ordered defendant to reclassify Otterson as a detective supervisor. In compliance

with that order, defendant, on October 24, 1978, reclassified all four Detectives II as Detective Supervisors. Therefore, the current pay scale is composed of the following officers:

Pay Range	*Position*	*Composition*
3	Detective	Male detectives promoted after 1972, including all plaintiffs
5	Detective Supervisor	Detectives "grandfathered" in 1972 and all former Policewomen II/Detectives II promoted as a result of DILHR order in 1978

6. On the basis of these facts, plaintiffs complain that their rights were violated by two actions of the City: 1) the promotion of Belle Stephenson from Policewoman I to Policewoman II on August 29, 1974; and 2) the promotion of all Detectives II to Range 5 as a result of the 1978 DILHR order. The Court will examine these claims independently.

A. Plaintiffs first direct the Court's attention to the state of affairs described in Conclusions of Law Paragraphs 5B and 5C. Despite the fact that plaintiff detectives could not move into Range 5, which was reserved for officers "grandfathered" in 1972, or Range 4, which was reserved for Policewomen II/Detective II on August 29, 1974. As plaintiffs assert, "this was discrimination against the male plaintiffs who were not allowed to compete for the higher paying position of Policewoman II or Detective II."

The City was justified, however, in promoting Belle Stephenson. Discrimination against women in the Madison Police Department did not end until 1973. At that time, a Policewoman I advanced to Policewoman II upon

successful completion of three years service. Therefore, by 1973, Belle Stephenson was already most of the way to promotion. To deny her a promotion in 1974 because all discrimination had ended the year before would place the burden of sexual equality on one who was a former victim of the discrimination. The City declined to do so, instead protecting her seniority by "red-circling" Stephenson and permitting her to progress to Policewoman II. *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1173 (5th Cir. 1976) explains:

> This device, commonly known as "red-circling", has been required by many courts in their attempts to remove all factors that would force affected class members seeking to achieve their rightful places "to pay a price for these opportunities". The rationale behind red circling is obvious. Had members of the affected class not been discriminated against, they would have had no need to transfer into formerly all-white lines of progression to qualify eventually for high paying jobs. A remedial program that allows blacks to transfer into formerly white lines but forces them to accept a temporary cut in pay is not an effective way of providing affected class members their rightful places.

By the same token, a remedial program that allows women to compete for positions previously closed to them but forces them to take a temporary or permanent restriction in pay or seniority is not an effective way to eliminate discrimination.

Furthermore, few plaintiffs appear to be in any position to challenge Stephenson's promotion. All but five plaintiffs were not detectives at the time of the promotion, and thus could not expect to jump from range 2 to range 4. Four others, plaintiffs Grann, Whitfield, Miller

and Faust, were promoted to detective on August 25, 1974, only four days before Stephenson's promotion. Surely they do not argue that their performance after four days as detectives merited an increase in wages. Only plaintiff Bernard Hebard, detective since September 3, 1972, has a legitimate complaint about Stephenson's promotion. That complaint, however, is negated by the City's defense of "red-circling."

B. Plaintiffs also argue that the promotion of all Detectives II to range 5, while plaintiffs performed identical work with more experience on the job, constitutes a violation of their rights. The Court must concur.

The Court would view the preservation of salaries of Detectives II at range 4 as a legitimate "red-circle." The City fails, however, to show any justification for promotion of these Detectives II to range 5, while male detectives at range 3 (i.e., plaintiffs) had, (and continue to have) no opportunity to advance to either range 4 or 5. The City's rationale that DILHR ordered the promotion of the Detectives II does not constitute an effective affirmative defense to the admitted *prima facie* case of discrimination. *See*, for example, *Williams v. General Food Corp.*, 492 F.2d 399, 404 (7th Cir. 1974) (compliance with state laws not defense to charge of discrimination under Title VII).

Nor can the City claim the promotion of all Detectives II to range 5 was a "red-circle." The Detectives II were *already* "red-circled" at range 4. By promoting the female Detectives II even further above plaintiffs, the City was not seeking to avoid a pay cut for females who wished to be promoted. No such pay cut was imminent—

the Detectives II remained untouched at range 4. Instead, the City raised the salaries of the Detectives II in violation of plaintiffs' right to receive equal pay for equal work.

Therefore, the City of Madison intentionally engaged in an employment practice, which this Court now determines to be unlawful, by discriminating against the plaintiffs on the basis of sex by promoting the four female Detectives II from pay range 4 to pay range 5 on October 24, 1978.

7. For their remedy, plaintiffs seek the following equitable relief:

a) promotion to Detective Supervisor and salary increase to range 5;

b) back pay as a result of the pay differential between plaintiffs and the former Detectives II;

c) interest on this back pay; or, in the alternative, liquidated damages;

d) attorneys' fees and costs.

8. The Court will grant plaintiffs' first request for relief, an injunction ordering defendant to promote plaintiffs to Detective Supervisor, increasing their salaries to range 5.

9. The Court, in its equitable discretion, declines to grant plaintiffs' second request for relief, back pay. As the Court of Appeals noted in *Williams v. General Foods Corp.*, 492 F.2d 399, 407 (7th Cir. 1974), "the conclusion that the [defendant] was intentionally engaging in an unlawful employment practice does not necessarily

warrant the awarding of injunctive relief and back pay." The Court of Appeals continued:

> [T]he plaintiff who is successful in proving an intentionally unlawful employment practice "should ordinarily be awarded back pay, unless special circumstances would render such an award unjust," *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 142 (4th Cir. 1973), since the "back pay award is not punitive in nature, but equitable." *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971). The Fourth Circuit has expressly suggested that reliance on state statutes allegedly conflicting with Title VII would constitute a special circumstance justifying the denial of an award of back pay. *Moody v. Albemarle Paper Co.*, supra, 474 F.2d at 142 n. 5. Rather than adopting a *per se* rule, however, we agree with the Ninth Circuit that "in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the harmdship [sic] on a good-faith employer." *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d at 1007.

Id. Also see Kober v. Westinghouse Electric Corp., 480 F.2d 240, 248 (3d Cir. 1973) (trial judge had discretion to deny back pay where employer follows applicable provisions of state law prior to judicial determination of its invalidity).

Plaintiffs' citation of *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) does not alter the Court's decision. Although finding that the District Court had erroneously declined to award back pay, the Supreme Court stated:

> It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons

> whole for injuries suffered through past discrimination.

Id. at 421 (footnote omitted). In a footnote, *Albemarle* suggested "that if a district court does decline to award backpay, it [should] carefully articulate its reasons." *Id.* at n.14.

Simply put, an award of back pay in this case would be manifestly unjust and fundamentally unfair.[1] The Court relies on the following reasons for its exercise of equitable discretion in declining to award back pay.

a. Plaintiffs will receive an immediate increase in pay and a promotion as a result of this suit. Their rights under the statutes will, therefore, be vindicated.

b. A denial of back pay will not dissuade future litigants from vindicating their rights. Plaintiffs have successfully received a promotion and pay increase, and will recover their costs and attorneys' fees in bringing this action.

c. The City and other similarly situated employers will be sufficiently deterred from future violations. The City must bear the considerable expense of raising sixteen employees two full pay ranges above their

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[1] The same considerations apply in both the Equal Pay Act and Title VII. The two statutes must be construed in harmony. See cases cited in *Orahood v. Board of Trustees of the University of Arkansas*, 645 F.2d 651, 654 (8th Cir. 1981). Therefore, the equitable flexibility in Title VII may not be undermined by a rigid approach to the Equal Pay Act. *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.) cert. denied, 398 U.S. 905 (1970). *See also Dunlop v. Saghatelian*, 520 F.2d 788 (9th Cir. 1975) (applying *Albemarle* to action under the Fair Labor Standards Act).

current salaries, as well as plaintiffs' costs and attorneys' fees.

d. The City has shown, and continues to show, earnest and sincere effort at compliance with statutes prohibiting discrimination in employment. Plaintiffs removed sexual designation from job titles and "red-circled" female officers. The City did not contest the DILHR order in 1978, but instead conscientiously implemented the agency's directive. The City should not be placed between the "rock" of the DILHR order and the "hard place" of damages from this suit. The City should be permitted to follow DILHR directives without fear of staggering court judgments solely as a rsult (sic) of that compliance. In short, the City should not suffer from discrimination statutes for unwittingly discriminating in its efforts to root out discrimination.

e. The City was justified in its belief that it was not discriminating against plaintiffs. The Court takes judicial notice of *Croal v. Labor and Industry Review Commission,* No. 78-CV-2095 (Cir. Ct. Dane Co. February 27, 1980), in which Judge Currie upheld the dismissal of an identical claim by a detective at range 3. The City had every right to rely on this determination, albeit interpreting state discrimination statutes.

f. The magnitude of the recovery may seriously impair the ability of the City to perform its municipal functions.

g. Finally, the Court notes that plaintiffs' request to be "made whole" will, in fact, be fulfilled by their pro-

motions. Any further award of back pay must be considered unjust enrichment. Plaintiffs have no claim for promotion to range 5 because of the fact that certain officers were "grandfathered" in 1972. Their only basis for promotion is the City's promotion in 1978 of all former Detectives II who were female. Because plaintiffs had no right to complain when the Detectives II were compensated at range 4, back pay at this time would create an unjust windfall, particularly where pay range 4 no longer exists.[2]

10. Plaintiffs also seek an award of liquidated damages or, in the alternative, interest on the back pay awarded. As the Court has declined to grant back pay to plaintiffs, this request would appear to be moot. Even if the Court had awarded back pay to plaintiffs, in its equitable discretion, it would not have assessed defendant the interest on those wages. *Taylor v. Phillips Industries, Inc.*, 593 F.2d 783, 787 (7th Cir. 1979).

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[2] The Court notes that if back pay were to be awarded, the date at which recovery would begin is October 24, 1978. Plaintiffs' counsel originally suggested that back pay be awarded from August 29, 1974, the date of the promotion of Belle Stephenson. Aside from the fact that the Court found no liability stemming from Stephenson's promotion, plaintiffs' suggestion suffers from an even more basic flaw. Title VII limits back pay recovery to "two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g). As plaintiffs filed their charge with the Commission in April, 1979, recovery for back pay under Title VII cannot begin until, at earliest, April, 1977. (Under the Equal Pay Act, the earliest possible date of recovery would be November 10, 1978. 29 U.S.C. § 255(a).

Were the Court to award back pay in its equitable discretion, the appropriate date to begin the computation would be October 24, 1978. On that date, the City took the action which created its liability in this case. It promoted all Detectives II to range 5. Before that date, plaintiffs suffered no violation of their rights.

Furthermore, the Court would not award liquidated damages because "the act or omission giving rise to [the violation] was in good faith and [defendant] had reasonable grounds for believing [its] act or omission was not a violation . . . " 29 U.S.C. § 260.

11. Plaintiffs will be awarded reasonable attorneys' fees and costs. Actual attorneys' fees shall be taxed as costs.

12. Defendant's request that this case proceed as a class action must be denied. Defendant has not demonstrated compliance with several prerequisites to class certification. First, the Court is not convinced that the class is so numerous that joinder of all members is impracticable. Rule 23(a)(1), Federal Rules of Civil Procedure. Furthermore, on the basis of plaintiff's counsel's refusal to endorse this motion, the Court cannot conclude that the class will be adequately protected by the repesentative parties. Rule 23(a)(4), Federal Rules of Civil Procedure.

ORDER

IT IS DECLARED that defendant intentionally engaged in an employment practice, which this Court now determines to be unlawful, by discriminating against the plaintiffs on the basis of sex by promoting the four female Detectives II from pay range 4 to pay range 5 on October 24, 1978.

IT IS ORDERED that the defendant is enjoined from paying the plaintiffs at range 3.

IT IS FURTHER ORDERED that plaintiffs shall be paid as Detective Supervisors at range 5, and promoted thereto.

IT IS FURTHER ORDERED that plaintiffs' request for back pay, interest, and liquidated damages is DENIED.

IT IS FURTHER ORDERED that plaintiffs shall be awarded reasonable attorneys' fees and costs, pursuant to Conclusions of Law Paragraph 11.

IT IS FURTHER ORDERED that defendant's request that this case be certified as a class action is DENIED.

Entered this 29th day of October, 1982.

BY THE COURT:

/s/ John C. Shabaz
District Judge

APPENDIX C

Case No. G807

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JON F. SIPPL, FRANCIS L. RETELLE, STEVEN D. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFEN, LEMUEL B. FRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs,

vs.

CITY OF MADISON,
a municipal corporation,

Defendant.

STIPULATION

(Filed August 20, 1982)

It is hereby stipulated that the following be used as facts for the court to decide the above-entitled matter:

All of the plaintiffs are employees of the defendant, City of Madison and are employed as detectives receiving Pay Grade 3; they are employed in the Investigative Services Bureau.

The City currently employs four women in the Investigative Services Bureau, including Belle Stephenson

and Mary Otterson. They are titled "detective supervisors" and receive Pay Grade 5.

There are approximately 16 male detective supervisors employed by the defendant, City of Madison, in the Investigative Services Bureau. They also receive Pay Grade 5.

The current base Pay Grade 5 is $875.43 biweekly. The current base Pay Grade 3 is $798.60 biweekly.

The positions of detective and detective supervisor, except for pay, are equal; detectives and detective supervisors employed by the City of Madison do identical work. A Madison Police Department job description, dated June, 1975, lists identical duties for Detective I, Detective II and Detective Supervisor.

All of the named plaintiffs—detectives—and detective supervisors, Belle Stephenson and Mary Otterson do equal work.

All of the named plaintiffs were promoted to the rank of detective after April, 1972. All of the male detective supervisors were promoted to the rank of detective before April, 1972. None of the detective supervisors reached that rank through promotion. The males, formerly detectives, were reclassified as detective supervisors in April, 1972 and the females, formerly Detective II's, were reclassified as detective supervisors in October, 1978.

Plaintiff Grann was first employed by the City of Madison as a patrolman on February 16, 1969. He was promoted to the rank of police officer on February 20, 1972 and to the rank of detective on August 25, 1974.

He received his promotion to detective as a result of the successful completion of competitive examinations.

Plaintiff Johnny Winston was hired by the City of Madison as a patrolman on October 6, 1969. He resigned July 27, 1970 and was rehired as a patrolman on December 26, 1972. He was promoted to the rank of police officer on December 30, 1973 and to the rank of detective on March 5, 1978. He received his promotion to detective as a result of the successful completion of competitive examinatons.

Plaintiff Gerald Whitfield was hired by the City of Madison as a patrolman on February 11, 1963. He resigned January 4, 1967 and was rehired as a patrolman on January 19, 1967. He was promoted to the rank of detective on August 25, 1974. He received this promotion as a result of the successful completion of competitive examinations.

Plaintiff Jon Sippl was hired by the City of Madison as a patrolman on September 8, 1965. He was promoted to the rank of detective on January 11, 1976 as a result of having successfully completed a competitive examination.

Plaintiff Francis Retelle was hired by the City of Madison as a patrolman on June 8, 1969. He was promoted to the rank of police officer on June 8, 1970 and to the rank of detective on June 1, 1975. He received his promotion to detective after having successfully competed (sic) competitive examinations.

Plantiff Steven Reinstra was hired by the City of Madison as a police cadet on October 26, 1970 and patrolman on June 15, 1972. He was promoted to the rank of

police officer on June 15, 1973 and to the rank of detective on July 2, 1978. He received his promotion to detective after having successfully completed competitive examinations.

Plaintiff Richard J. Miller was hired by the City of Madison as a police cadet on June 21, 1965 and as a patrolman on May 18, 1967. He was promoted to the rank of detective on August 25, 1974 after having successfully completed competitive examinations.

Plaintiff Robert Lombardo was hired by the City of Madison as a patrolman on October 2, 1967 and was promoted to the rank of detective on June 1, 1975, after having completed successful competitive examinations.

Plaintiff Steven Koecke was hired by the City of Madison as a patrolman on July 11, 1971. He was promoted to the rank of police officer on July 11, 1972 and to the rank of detective on January 11, 1976, after having completed successful competitive examinations for that position.

Plantiff Rudolph Jergovic was hired by the City of Madison as a patrolman on July 12, 1971 and was promoted to the rank of police officer on July 12, 1972. He was promoted to the rank of detective on November 12, 1978 after having completed successful examinations.

Plaintiff Bernard Hebard was hired by the City of Madison as a patrolman on February 12, 1962 and was promoted to the rank of detective on September 3, 1972, after having completed successful competitive examinations.

Plaintiff William Gilfoy was hired by the City of Madison as a patrolman on July 7, 1968 and was pro-

moted to the rank of detective on June 1, 1975 after having completed successful competitive examinations.

Plaintiff Dennis Gerfen was hired by the City of Madison on February 24, 1974 and was promoted to the rank of detective on July 2, 1978, after having completed successful competitive examinations.

Plaintiff Lemuel Fraser was hired by the City of Madison as a patrolman on June 8, 1969 and was promoted to the rank of police officer on February 20, 1972. He was promoted to the rank of detective on August 25, 1974 after having completed successful competitive examinations.

Plaintiff Robert Faust was hired by the City of Madison as a patrolman on May 16, 1955 and was promoted to the rank of detective on August 25, 1974 after having completed successful competitive examinations.

Plaintiff Kenneth Couture was hired by the City of Madison as a patrolman on June 28, 1971. He was promoted to the rank of police officer on June 28, 1972 and the rank of detective on March 5, 1978. He obtained the rank of detective after having successfully completed competitive examinations.

In all cases, promotions to detective achieved by the plaintiffs resulted from the following process. Each plaintiff successfully completed written and oral examinations. After successfull completion of the examinations, each plaintiff was placed in a group of eligible candidates from which each plaintiff was selected by the police chief and recommended for promotion. The selection was approved by the Police and Fire Commission.

The following chart reflects the base pay grades for Grades 3, 4 and 5 for the years 1973 through 1982. In 1978 or 1979, the pay grades were revised so that 3 became 2 and 5 became 4. This change did not affect the relationships between grades or the amount of pay. To avoid confusion, the parties will continue to use the numbers 3 and 5.

YEAR	GRADE 3	GRADE 4	GRADE 5
1973	445.23	467.62	491.02
1974	467.49	491.00	515.57
1975	504.89	530.28	556.82
1976	540.23	567.40	595.80
1977	572.10	600.88	630.95
1978	612.62	643.44	675.64
1979	654.51	685.29	717.49
1980	724.35	758.41	794.04
1981	798.60	836.15	875.43
1982	870.47	911.40	954.22

Figures shown are biweekly base pay for the second half of the year. Precise figures are shown on applicable police contracts.

Mary Otterson began her employment with the City of Madison as a policewoman, hired on September 2, 1969. By unwritten policy, in 1969, no other commissioned ranks or job classifications in the Madison Police Department were open to women and women were not allowed to attend police training classes wth men. She was promoted to the rank of Policewoman I in February, 1972. That rank included the Pay Grade 2. In February, 1972 her base pay was $356.93. In September, 1972, she was promoted to the rank of Policewoman II. The Position

of Policewoman II had the base Pay Range 4. Base Pay Range 4 at that time was $447.48. Otterson did not take a competitive exam in order to be promoted to the position of Policewoman II. Instead, she was required to have three years of satisfactory service as a Policewoman. Competitive examinations for higher ranks, such as detective were not open to women as of September, 1972.

Belle Stephenson began her employment with the City of Madison in June of 1958. She was promoted to the position of Policewoman I on August 16, 1960. She resigned her position on March 6, 1965 and was rehired in 1966. She was promoted to the position of Policewoman II on August 29, 1974. At that time, her base pay range was Grade 4.

In 1972, City of Madison Police Department job classifications were revised for reasons largely unrelated to Title VII of the Civil Rights Act. The collective bargaining agreement between the City of Madison and the Madison Professional Policemen's Association, signed December 23, 1969, provided that a classificaton study of all positions in the bargaining unit was to be completed by August 1, 1970 and implemented in 1971.

A consultant, Public Administration Service, was retained by the City. The consultant's report was finished in 1971. The consultant found that "the current high placement of the detective classification tends to detract from patrol services, which in fact are the primary police functions." The consultant believed that the detectives should be placed at a lower pay level so that the pay differential between police officers and detectives would be less pronounced.

The consultant's recommendations were considered by the Board of Police and Fire Commissioners. One of the resulting recommendations was to create a new detective classification at a lower pay grade. This recommendation was adopted, although the study made other recommendations which were not adopted. The Board also recommended that the incumbent detectives would be retitled as detective supervisors. They would be "grandfathered" in at their current pay range, Grade 5. All entry-level detectives would receive Pay Grade 3. All of the incumbent detectives were males.

The reorganization resolution as recommended by the Board of Police and Fire Commissioners, was passed by the City Council on April 25, 1972.

A new chief created the Investigative Services Bureau in October of 1973. This bureau resulted from a combination of the former Detective Bureau and the Crime Prevention Bureau. Previously, the Crime Prevention Bureau was the bureau in which policewomen worked. Its function involved primarily women offenders, sex offenders, juvenile work and family disputes. Otterson and Stephenson were transferred to the new Investigative Services Bureau in October, 1973. When Stephenson came into the Investigative Services Bureau in 1973, her title was Policewoman I. At that time, she began to do the same work that was done by detective supervisors and by detectives. She was promoted to the rank of Policewoman II in 1974, without having to compete for that promotion. Instead, her promotion came automatically with three years of satisfactory service. In 1974, all of the Policewoman II's were retitled "Detective 2."

Mary Otterson became a Policewoman II late in 1972, without having to complete a competitive examination for that promotion. She started working in the Investigative Services Bureau in October of 1973, doing the same work as the detectives and detective supervisors. At that time, she was being paid one pay grade above detectives and one pay grade below the detective supervisors. She was retitled as a Detective II in 1974. After the 1973 reorganization plan that brought women into the Investigative Services Bureau, the position of Detective II was created for women whose previous title had been Policewoman II. The purpose was to eliminate sex designations from job titles. The retitling occurred in 1974. The base pay grade for the new position remained at Grade 4; the retitled women did not receive a base pay increase. These positions were not open to male detectives, and were to be phased out by promotion or retirement of the incumbent women.

When Otterson and Stephenson went into the Investigative Services Bureau, no female detective supervisors were in that bureau. There were no female detectives. As a practical matter, before January 1, 1973, males could not compete for the position of Policewoman II having a pay grade of Grade 4. In addition, women could not compete for the position of detective or higher ranks. Before 1973, women had not been allowed to apply for the positions of patrolman or police officer and the position of policewoman, Policewoman I and Policewoman II were the only positions open to them. Before 1973, the highest rank that women could obtain in the City of Madison Police Department by policy was that of Policewoman II. No further advancement was available to them. In De-

cember, 1975, Otterson filed a discrimination complaint with the Equal Rights Division of the Department of Industry, Labor and Human Relations. The City denied any discrimination.

Subsequently, DILHR ordered the City of Madison to reclassify her as a detective supervisor. This order was entered on August 1, 1978. As a result she was reclassified as a detective supervisor whose base pay rate was Grade 5 on October 24, 1978.

In further compliance with the Department's order, defendant reclassified all Detective II's as Detective Supervisors at Pay Grade 5. Otterson received back pay measured by the difference between Grade 5 and Grade 4 from December 11, 1973 to August 1, 1978. The City did not appeal the Department's order.

From January 1, 1973, discrimination in regard to the positions open to women in the Madison Police Department ended. On May 27, 1973, Policewoman II Morlynn Frankey was promoted to Lieutenant (pay range 6).

All male detectives had attained the rank of detective through a competitive examination and interviewing process while the policewomen had attained their rank by three years of satisfactory service. No one competed for the rank of detective supervisor. This reclassification included no pay increase but, rather, protected their pay level from being reduced to the Grade 3 provided by the resolution for new detectives. The female Detective II's became detective supervisors at the order of the Department. This reclassification did include a pay increase because the detective II's had been at pay Grade 4.

From the time of the first departmental reorganization on April 25, 1972, through the present, the City of Madison has been aware that it is subject to the equal pay provisions of the Fair Labor Standards Act, of the Federal Government.

The actions of the City of Madison in reorganizing its Police Department were voluntary, deliberate and intentional.

In October of 1973 after the Investigative Services Bureau was created, Policewoman II's, Detective Supervisors and Detectives were doing equal work.

Detective Croal, the plaintiff in *Croal v. City*, Case No. 81 C 450, had filed a complaint of sex discrimination with the Department of Industry, Labor and Human Relations on October 21, 1974. The Department held a hearing on the complaint on September 30, 1976. On April 6, 1977, a Department examiner recommended dismissal of the complaint. On November 10, 1978, the Labor and Industry Review Commission dismissed the complaint. Croal filed a petition for review in Dane County Circuit Court.

In February of 1979, Plaintiff Grann and the other plaintiffs in Case No. 81 C 807 filed complaints of sex discrimination with the Department of Industry, Labor and Human Relations and in April of 1979, with the U.S. Equal Employment Opportunities Commission. The U.S. EEOC issued an initial determination of no probable cause on their complaints on June 8, 1979.

On February 27, 1980, the Dane County Circuit Court affirmed DILHR's dismissal of Croal's complaint.

Plaintiff Croal's appeal to the Court of Appeals, filed April 9, 1980, was untimely filed and his request for dismissal was granted by the court.

Plaintiff Croal first requested a right to sue letter on August 29, 1980. Subsequent written requests were made in December, 1980 and April, 1981. One of the written requests was directed to Senator Kasten and one threatened an action for mandamus. Croal received his right to sue letter on April 24, 1981. The Grann plaintiffs made no separate request, but received theirs on August 31, 1982.

It is the City's position, that when the position of detective supervisor was created, that position was limited to those individuals originally placed therein, and that eventually the position of detective supervisor would be reduced to zero through attrition, promotion and retirements within that classification.

It is the position of the plaintiffs, that the classification detective supervisor was to be limited to tweny-four individuals, bu that when through attrition or retirement there were less than twenty-four individuals classified as detective supervisors, detectives and other members of the police force would be allowed to compete for the openings in the detective supervisor classification.

The collective bargaining agreement currently in effect for all of those employed by the police department provides for a system of classification seniority. Classification seniority does not affect longevity, pay or layoff procedures. Classification seniority does affect the choice of vacation time, work schedules, and job assignments. Under the seniority system in effect during the time the

city maintained the classifications of detective supervisor, detective II and detective, detective supervisors as a class had higher classification seniority than detective II's and detective II's had higher classification seniority as a class than detectives, with one exception. The Police Department required at least one female officer on duty every weekend. Since there were only two female officers in the Investigative Services Bureau, they worked more weekends than did the male detectives, in spite of their higher classification seniority. This practice was discontinued in September, 1974.

At the present time, detective supervisors as a class maintains higher classification seniority than does the classification of detective.

The relevance of the listed facts has not been stipulated to by the parties.

Dated this 20 day of August, 1982.

Barrett Corneille
Attorney for Plaintiffs

/s/ Eunice Gibson
Attorney for Defendant

227.01 Definitions. In this chapter:

(6) "Party" means each person or agency named or admitted as a party. Any person whose substantial interests may be adversely affected by any proposed action in a contested case shall be admitted as a party.

227.064 Right to hearing. (1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:

(a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;

(b) There is no evidence of legislative intent that the interest is not to be protected;

(c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

(d) There is a dispute of material fact.

(2) Any denial of a request for a hearing shall be in writing, shall state the reasons for denial, and is an order reviewable under this chapter. If the agency does not enter an order disposing of the request for hearing within 20 days from the date of filing, the request shall be deemed denied as of the end of the 20-day period.

(3) This section does not apply to rulemaking proceedings or rehearings, or to actions where hearings at the discretion of the agency are expressly authorized by law.

(4) This section does not apply if a hearing on the matter was conducted as a part of a hearing under s. 144.836.

(5) Except as provided under s. 144.44 (2)(m), this section does not apply to any part of the process for approving a feasibility report, plan of operation or license under s. 144.44 or 144.64, any decision by the department of natural resources relating to the environmental impact of a proposed action under ss. 144.43 to 144.47 or 144.60 to 144.74, or any part of the process of negotiation and arbitration under s. 144.445.

History: 1975 c. 414; 1977 c. 418; 1979 c. 221; 1981 c. 374.

227.15 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125 and decisions of the department of employee trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, and the state board of vocational, technical and adult education acting under s. 38.29, and except as otherwise provided by law.

History: 1975 c. 414; 1977 c. 187, 418; 1981 c. 79.96, 391.

Cross Reference: See 50.03 (11) for review under subchapter I of chapter 50.

Legislative Council Note, 1981: The amendment to s. 227.15 applies court review under ch. 227 to revo-

cations, suspensions and nonrenewals by the department of permits issued by it. [Bill 300-A]

An order of the tax appeals commission refusing to dismiss proceedings for lack of jurisdiction is not appealable because the merits of the case are still pending. Pasch v. Dept. of Revenue, 58 W (2d) 346, 206 NW (2d) 157.

The requirements of 227.15 and 227.16(1), for standing to seek review of an administrative decision, do not create separate and independent criteria, but both sections essentially require that to be a person aggrieved for standing purposes, one must have an interest recognized by law in the subject matter which is injuriously effected by the decision. Wisconsin's Environmental Decade, Inc. v. PSC, 69 W (2d) 1,230 NW (2d) 243.

An order of the employment relations commission directing an election and determining the bargaining unit under 111.70(4)(d) is not reviewable. West Allis v. WERC. 72 W (2d) 268, 240 NW (2d) 416.

See note to 111.07, citing WERC v. Teamsters Local No. 563, 75 W (2d) 602, 250 NW (2d) 696.

Unconditional interim order by Public Service Commission fixing utility rates pending final determination is reviewable where no provision was made for refund of excess interim rates. Friends of Earth v. Public Service Commission, 78 W (2d) 388, 254 NW (2d) 299.

Decision of PSC not to investigate under 196.28 and 196.29 was a nonreviewable, discretionary determination. Reviewable decisions defined. Wis. Environmental Decade v. Public Service Comm. 93 W (2d) 650, 287 NW (2d) 737 (1980).

See note to 808.03, citing Bearns v. DILHR, 102 W (2d) 70, 306 NW (2d) 22 (1981).

Administrative decisions eligible for judicial review in Wisconsin. Klitzke, 61 MLR 405.

227.16 Parties and Proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70 (6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the

parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

227.20 Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency

as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute is judgment for that of the agency on any issue of discretion.

(9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary

authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

History: 1975 c. 94 s. 3; 1975 c. 414; 1979 c. 208.

Finding of fact is supported under (6) if reasonable minds could arrive at the same conclusion. Westring v. James, 71 W (2d) 462, 238 NW (2d) 695.

Reviewing court, in dealing with determination or judgment which administrative agency is alone authorized to make, must judge propriety of action solely by grounds invoked by agency with sufficient clarity. Stas v. Milw. County Civil Service Comm. 75 W (2d) 465, 249 NW (2d) 764.

See note to 30.12, citing Kosmatka v. DNR, 77 W (2d) 558, 253 NW (2d) 887.

Summary judgment procedure is not authorized in proceedings for judicial review under this chapter. Wis. Environmental Decade v. Public Service Comm. 79 W (2d) 161, 255 NW (2d) 917.

"Discretion" means process of reasoning, not decisionmaking, based on facts in record or reasonably inferred from record, and conclusion based on logical rationale founded on proper legal standards. Reidinger v. Optometry Examining Board, 81 W (2d) 292, 260 NW (2d) 270.

See note to 220.035, citing State ex rel. 1st Nat. Bank v. M & I Peoples Bk. 82 W (2d) 529, 263 NW (2d) 196.

See note to 1.11, citing Wis. Environmental Decade v. Public Service Comm. 98 W (2d) 682, 298 NW (2d) 205 (Ct. App. 1980).

See note to 806.07, citing Charter Mfg. v. Milw. River Restoration, 102 W (2d) 521, 307 NW (2d) 322 (Ct. App. 1981).

Party cannot recover attorney's fees against state under (9). Administrative judge should have been disqualified due to compelling appearance of impropriety. Guthrie v. Wis. Employment Relations Comm. 107 W (2d) 306, 320 NW (2d) 213 (Ct. App. 1982).

See note to art. I, sec. 1, citing Hortonville Dist. v. Hortonville Ed. Asso. 426 US 482.

The scope of judicial review in Wisconsin. Hewitt, 1973 WLR 554.

111.31 Declaration of policy. (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies and licensing agencies which deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record deprive those individuals of the earnings which are necessary to maintain a just and decent standard of living.

(2) It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orien-

tation, arrest record or conviction record, and to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family and all the people of the state. It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employe or applicant for employment based upon the employe's or applicant's individual qualifications rather than upon a particular class to which the individual may belong.

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record. Nothing in this subsection requires an affirmative action program to correct an imbalance in the work force. This subchapter shall be liberally construed for the accomplishment of this purpose.

(4) The practice of requiring employes or prospective employes to submit to honesty tests without providing safeguards for the test subjects is unfair, and the use of improper tests and testing procedures causes injury to the employes and prospective employes.

(5) The legislature finds that the prohibition of discrimination on the basis of creed under s. 111.337 is a matter of statewide concern, requiring uniform enforcement at state, county and municipal levels.

History: 1977 c. 125; 1979 c. 319; 1981 c. 112, 334, 391.

Summary discharge after 2 weeks of satisfactory employment of persons with history of asthma violated the fair employment act in that it constituted a discriminatory practice against the claimant based on handicap. Chicago, M., St. P. & P. RR. Co. v. ILHR Dept. 62 W (2d) 392, 215 NW (2d) 443.

The department is not limited to finding sex discrimination only where a 14th amendment equal protection violation could also be found. Wisconsin Telephone Co. v. ILHR Dept. 68 W (2d) 345, 228 NW (2d) 649.

The Wisconsin Fair Employment Act is more direct and positive in prohibiting sex discrimination in employment than is the basic constitutonal guarantee of equal protecton of the laws, and enforcement of the law is not limited by the "rational basis" or "reasonableness" test employed in 14th amendment cases. Ray-O-Vac v. ILHR Dept. 70 W (2d) 919, 236 NW (2d) 209.

Section 118.20 is not exclusive remedy of wronged teacher; it is supplementary to remedy under fair employment act. General provisions of 893.80 are superseded by specific authority of act. Kurtz v. City of Waukesha, 91 W (2d) 103, 280 NW (2d) 757 (1979).

Where employe was not handicapped but employer perceived employe to be handicapped, employe was entitled to protection under this subchapter. Dairy Equipment Co. v. DILHR, 95 W (2d) 319, 290 NW (2d) 330 (1980).

This act protects all employes, including prospective and de facto employes. 67 Atty. Gen. 169.

Employee Retirement Income Security Act does not preempt state fair employment laws prohibiting discriminatory exclusion of pregnancy benefits in disability plans. Bucyrus-Erie Company v. DILHR, 599 F (2d) 205 (1979).

Wisconsin's fair employment act: coverage, procedures, substance, remedies. 1975 WLR 696.

111.395 Judicial review. Findings and orders of the commission under this subchapter are subject to review under ch. 227. Orders of the commission shall have the same force as orders of the department under ch. 101 and may be enforced as provided in s. 101.02(12) and (13) or specifically by a suit in equity. In any enforcement action the merits of any order of the commission are not subject to judicial review. Upon such review, or in any enforcement action, the department of justice shall represent the commission.

History: 1977 c. 29, 418; 1981 c. 334 s. 23.

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No. 84-304

In The

Supreme Court of the United States

October Term, 1984

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JON F. SIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFEN, LEMUEL B. FRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs-Petitioners,

v.

CITY OF MADISON, a municipal corporation,

Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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September 19, 1984

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QUESTIONS PRESENTED

1. Whether the City of Madison discriminated against the petitioners on the basis of their sex when it complied with a state agency order to promote two female employees on October 24, 1978,

2. Whether the City of Madison discriminated against the petitioners on the basis of their sex when it promoted Belle Stephenson to Policewoman II on August 29, 1974.

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OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 738 F.2d 786 (7th Cir. 1984). It appears at 35 FEP Cases 296, and is set forth fully in Appendix A of the petition for writ of certiorari. The opinion of the District Court for the Western District of Wisconsin is not yet officially reported, but appears at 35 FEP Cases 291. It is set forth in Appendix B of the petition for writ of certiorari.

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JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 25, 1984. A petition for writ of certiorari was filed within 60 days. Defendant-respondent's response to the petition has been filed within 30 days after receipt of the petition. This Court has jurisdiction under 28 USC Sec. 1254(1) to grant or deny the petition.

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STATEMENT OF THE CASE

The petitioners are male detectives employed by the City of Madison, Wisconsin. On November 11, 1981, they filed a complaint in the U.S. District Court for the Western District of Wisconsin, alleging that the defendant City of Madison had discriminated against them in their employment on the basis of their sex, violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000(e) et seq., and the Equal Pay Act, 29 U.S.C. Sec. 206(d)(1).

Madison moved for summary judgment, alleging that petitioners' claim was barred by collateral estoppel, because of a state court decision in a similar action brought by another male detective. That motion was denied by the District Court on August 13, 1982.

The case was tried on stipulated facts. These facts are set forth in full in petitioners' Appendix C, pp. 38-50. The District Court, on November 3, 1982, held that Madison had violated Title VII and the Equal Pay Act when it complied with a state agency order to promote certain female detectives in 1978, but that there had been no violation when Policewoman Belle Stephenson was promoted to Policewoman II in 1974. The District Court denied petitioners' request for back pay and denied Madison's request for a stay. The stay was granted by the Court of Appeals for the Seventh Circuit in December, 1982.

The City of Madison filed a timely appeal of the District Court's decisions denying its motion for summary judgment and holding that it had violated Title VII and the Equal Pay Act. The petitioners cross-appealed, alleging that the District Court erred in finding that Madison had not violated Title VII when it promoted Belle Stephenson in 1974, and in refusing to order back pay.

The Court of Appeals, on June 25, 1984, affirmed the decisions of the District Court denying Madison's motion for summary judgment and finding no discrimination in the promotion of Belle Stephenson. The Court of Appeals reversed the decision of the District Court finding Madison had violated Title VII and the Equal Pay Act when it complied with the state agency's order to promote the former Policewomen to Detective Supervisor.

Petitioners filed a timely petition to this Court for a writ of certiorari. Madison has filed no cross-petition and accepts the ruling of the Court of Appeals on its motion for summary judgment.

Title VII of the Civil Rights Act of 1964, forbidding employment discrimination because of sex, was amended in 1972 to cover municipal employment. At that time, the Madison Police Department hired only male Police Officers and hired women only as Policewomen. (Pet. App. C, pp. 43, 46) Policewomen were assigned only to the Crime Prevention Bureau and were not allowed to attend police training classes (Pet. App. C, p. 43) or work as Patrolmen or Police Officers. They were not allowed to compete for positions as Detectives, or any other position except Policewoman I and Policewoman II. (Pet. App. C, p. 46) The highest grade a woman could achieve, Policewoman II, was paid at Pay Range 4, and Detectives were paid at Pay Range 5. (Pet. App. C, pp. 43, 46)

Also in 1972, the City decided to create a new Detective classification at a lower pay range. (Pet. App. C, p. 45) This decision was based on a consultant's report which recommended that the pay differential between Detectives and Police Officers be decreased. (Pet. App. C, p. 44) Thus, all persons promoted to Detective after April, 1972, including all the plaintiffs, have been paid at Pay Range 3. (Pet. App. C, p. 45) At the same time, it was decided not to lower the pay of the incumbent Detectives. Instead, they were "grandfathered" in Range 5, and were retitled "Detective Supervisor" with no change in duties. (Pet. App. C, p. 45) All of the Detective Supervisors were males. (Pet. App. C, p. 45)

Not long after this change was complete, on September 3, 1972, George Croal, then a Police Officer, was promoted to Detective.

Late in 1973, the Chief of Police reorganized the Department, eliminating the Crime Prevention Bureau, creating an Investigative Services Bureau and assigning Policewomen, Detectives and Detective Supervisors to the Bureau. (Pet. App. C, p. 45) All of the Policewomen, Detectives and Detective Supervisors were assigned to perform the same duties. (Pet. App. C, pp. 39, 45) These organizational changes involved no changes in classification or pay.

Late in the following year, 1974, the Policewomen were retitled Detective II to eliminate the sex designation from the job title. There was no change in pay or duties. (Pet. App. C, p. 45)

On October 21, 1974, Detective George Croal filed a complaint of sex discrimination with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations, alleging that the City of Madison violated Wisconsin's Fair Employment Act by paying him a base salary lower than that received by the female Policewomen or Detective II's who performed the same work. (Pet. App. C, p. 48) He filed the same complaint with the U.S. Equal Employment Opportunity Commission.

In December, 1975, two of the Detective II's, Mary Otterson and Mary Ostrander, filed a discrimination complaint with the Equal Rights Division of the Wisconsin

Department of Industry, Labor and Human Relations. (Pet. App. C, p. 49)

On September 30, 1976, the Department held a hearing on Detective Croal's complaint of discrimination. The hearing was held before a hearing examiner, who recommended the complaint be dismissed. (Pet. App. C, p. 48) On November 18, 1978, the Labor and Industry Review Commission affirmed the hearing examiner's recommended findings and order.

Detective Croal appealed the order of the Labor and Industry Review Commission to Dane County Circuit Court. (Pet. App. C, p. 48)

Also late in 1978, the Department of Industry, Labor and Human Relations found that the City had discriminated against the former Policewomen. (Pet. App. C, p. 47) The Department ordered the city to promote the former Policewomen to Detective Supervisor, Pay Range 5, and to pay back pay. The City complied with the order and did not appeal. (Pet. App. C, p. 47)

Petitioners Grann, Winston, Whitfield, Sippl, Retelle, Reinstra, Miller, Lombardo, Koecke, Jergovic, Hebard, Gilfoy, Gerfen, Fraser, Faust, and Couture then filed a complaint similar to Croal's complaint, both with the Wisconsin Department of Industry, Labor and Human Relations, and with the U.S. Equal Employment Opportunities Commission. (Pet. App. C, p. 48; Resp. App. A) Both agencies issued determinations finding no probable cause to believe the law had been violated. (Pet. App. C, p. 48)

On February 27, 1980, the Dane County Circuit Court, Judge Currie presiding, issued a memorandum decision and judgment affirming the order of the Labor and Industry Review Commission, dismissing Detective Croal's complaint. (Pet. App. C, p. 48) Detective Croal filed an appeal to the Court of Appeals, but dismissed it voluntarily on June 5, 1980. (Pet. App. C, p. 49)

Detective Croal filed an action in the U.S. District Court for the Western District of Wisconsin, Case No. 81-C-450, on July 14, 1981 and petitioners filed this action on November 10, 1981. The two actions were consolidated and Croal's complaint was later dismissed.

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SUMMARY OF ARGUMENT

Defendant-respondent, the City of Madison, argues that, on the facts of this case, petitioners cannot accurately be characterized as "employees adversely affected" by an order to remedy discrimination. The Court of Appeals decision is in fact more limited than they claim. It does not result in precluding affected co-workers from challenging orders remedying discrimination. Nor are there any constitutional arguments raised by the facts of this case. Thus, they do not demonstrate the existence of any important federal question which should be settled by this Court. Neither have they demonstrated that the Courts of Appeal have made conflicting decisions on any issue in this case.

Petitioners have failed to cite decisions of this Court which conflict with the holding of the Court of Appeals in this case. The only cases they cite are those which deal with competitive seniority awarded as a remedy in class action or "pattern and practice" suits, such as *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S.Ct. 2576, 81 L.Ed. 2d 483 (1984); *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2d 396 (1977); and *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976). These cases do not conflict with the decision of the Court of Appeals in this case. They hold that a class member who is "affected" by the acts held to be discriminatory is entitled to a remedy.

In the instant case, the stipulated facts establish that the female Detective II's, whose state-ordered remedy is attacked by petitioners as violative of their rights, were "affected" by the prior Police Department policy which made street duty, training classes, and competition for promotion unavailable to them. Thus, the promotion which the state agency ordered as their remedy is in no way inconsistent with decisions of this Court. Nor does any decision of this Court hold that such a remedy conflicts with the rights of co-workers or constitutes prohibited discrimination.

Defendant-respondent argues that petitioners have offered this Court no reason why a writ of certiorari should be granted.

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ARGUMENT

I. This Case Contains No Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court.

A. Petitioners Cannot Be Characterized As "Employees Adversely Affected" As That Term Has Been Used By Federal Courts In Title VII Litigation.

Petitioners repeatedly characterize themselves as "employees adversely affected" by a state administrative agency decision (Petition, pp. 10, 11, 12, 17, 18) and cite the facts in *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S.Ct. 2576, 81 L.Ed. 2d 483 (1984), as analogous to their situation. In fact, their case is very different.

Petitioners claim that the state agency's order affects their seniority rights.

The plaintiffs in *Stotts,* however, relied on their seniority rights, as guaranteed by Title VII, to protect them from layoff. In Wisconsin, police department layoffs and recall rights are governed by statute, and depend upon total time in police department employment. See Sec. 62.13(5m), Wis. Stats. (1981-1982). The petitioners have stipulated that their rights to longevity pay and to protection from layoff are not affected by the events which they dispute. (Pet. App. C, pp. 49, 50)

The stipulated facts establish that the rights governed in petitioner's contract by "classification seniority" are limited to choice of vacation time, choice of work schedule, and choice of job assignment. (Pet. App. C, p.

49) The extent of the "adverse effect" is that, in case there are more requests for a particular vacation period, a particular work schedule, or particular job assignment than can be accommodated by management under given workload conditions, one of the petitioners might have to give way to the preference of one of the four women detective supervisors. (Pet. App. C, pp. 49, 50) That is the full extent of the "adverse effect".

The Court of Appeals, in its memorandum decision, emphasized the minimal effect upon the petitioners of the events which they complain of. (Pet. App. A, pp. 19, n.5, 21, 11) Petitioners have never, at any stage of the proceedings, claimed the protection of Sec. 703(h) of Title VII, because the facts do not support any such claim. Yet they attempt to place themselves in the position of "adversely affected" employees such as those in *Stotts,* supra; *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2d 396 (1977); and *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976).

Petitioner's reference to this limited effect upon their "classification seniority" (Pet. App. C, pp. 49, 50), as affecting their "seniority rights" is disingenuous. The term "seniority", as it is used in Sec. 703(h) of Title VII and cases which interpret that section, is understood to include some of the most important benefits and burdens of employment, including retention of the job itself. *Ford Motor Co. v. EEOC,* 458 U.S. 219, 102 S.Ct. 3057, 3070, 73 L.Ed. 2d 721 (1982) citing *American Tobacco Co. v. Patterson,* 456 U.S. 63, 102 S.Ct. 1534, 1541, 71 L.Ed. 2d 748 (1982), and *Franks v. Bowman Transportation Co.,* 424

U.S. 747, 766-767, 96 S.Ct. 1251, 1265, 47 L.Ed. 2d 444 (1976).

In contrast, only minimal benefits and burdens are at stake here.

B. Petitioners Have Misstated The Decision Of The Court Of Appeals.

Petitioners allege that the decision of the Court of Appeals denies an adversely affected employee a right to challenge a state administrative order in the federal courts. (Petition, p. 11) The court's ruling is by no means so broad.

Rather, the Court of Appeals held that, on the facts of this case, admittedly unique, Madison's compliance with the state agency order did not violate the petitioners' federal statutory rights. This holding was based on a careful examination by the Court of Appeals of the provisions of Wisconsin's Fair Employment Act and of Title VII and on its finding that the two laws are consistent with each other. (Pet. App. A, p. 15) Furthermore, the Court of Appeals found that the state agency's remedial order was reasonable under the circumstances. (Pet. App. A, p. 21) Finally, the court pointed out that petitioners were affected only minimally by the remedial order (Pet. App. A, pp. 21, 22) and that Wisconsin's Administrative Procedure Act would have permitted them to be parties to the agency proceeding. (Pet. App. A, p. 23)

Contrary to petitioner's allegation (Petition, p. 11), employees who challenge a state administrative order which conflicts with Title VII, who can show actual adverse effects or who are denied the right to participate

in state proceedings, will not be prevented by this Court of Appeals' decision from vindicating their federal rights.

C. This Case Raises No Constitutional Issues.

1. Constitutional arguments were not raised in the lower courts.

Petitioners have at all times argued that the effect of the state agency order interfered with their rights under Title VII and the Equal Pay Act. This was the subject of their administrative complaint to the EEOC, and of their complaint filed in the District Court. (Resp. App. A, B) At no time, prior to their petition to this Court, have they asserted that the effect of the state agency order affected their constitutional rights.

Now petitioners argue that they have been denied due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

This court should not consider this argument at this late date. See *G. D. Searle & Co. v. Cohn,* 455 U.S. 404, 102 S.Ct. 1137, 1144, 71 L.Ed. 2d 250 (1982). See also *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 1985, 18 L.Ed. 2d 1094 (1967), citing *Michel v. State of Louisiana,* 350 U.S. 91, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955).

2. The facts do not support a claim that any of their constitutional rights are violated.

The petition does not state precisely how petitioners have been denied their right to due process of law. They do claim that the Court of Appeals denied their due process rights by its observation that, under Wisconsin law,

they could have intervened in the state agency proceeding which culminated in the remedial order to which they object. (Petition, pp. 11,12)

Their claim that they would have had only 30 days in which to intervene (Petition, p. 12) is inaccurate. Wisconsin's Administrative Procedure Act contains liberal intervention provisions. The Court of Appeals cited Secs. 227.01(6), 227.064 and 227.16, Wis. Stats. Those and other relevant provisions are set forth in the appendix to Petitioners' brief at pages 51-62.

First of all, Chapter 227 places no time limit on their request to be admitted as parties. See Secs. 227.01(6), 227.064 and 227.07, Wis. Stats. Section 227.01(6), Wis. Stats. contains a liberal definition of the term "party" as it is used in Chapter 227:

> 227.01 Definitions. In this chapter:
>
> * * *
>
> (6) "Party" means each person or agency named or admitted as a party. Any person whose substantial interests may be adversely affected by any proposed action in a contested case shall be admitted as a party.

If petitioners' rights are affected to the degree that they claim, they would have had a right under this section to be parties at all stages of the agency proceedings on the women's complaint.

Chapter 227 also creates a liberal right of affected persons to a hearing. See Sec. 227.064, Wis. Stats. (Pet. App. 51) They would have had a right to the same notice of hearing received by other parties, to participate in the

hearing as parties, and to seek judicial review of the agency's order.

Section 227.16(a), Wis. Stats., provides that petitions for review must be filed within thirty (30) days after service of the agency's decision upon all parties, but that limitation could not constitute a denial of due process. Their petition does not cite any other set of facts which could constitute a denial of due process of law.

II. There Is No Conflict Among The U.S. Courts Of Appeal On Any Issue In This Case.

Petitioners emphasize the statement of the Court of Appeals that this is a case of first impression. (Petition, p. 10) Nevertheless, they also claim that there is a conflict among the Courts of Appeal for the various circuits. (Petition, p. 19) In fact, no Court of Appeals has ruled on the precise issue dealt with by the Court of Appeals for the Seventh Circuit in this case, but three other circuits are in agreement on analogous issues.

Petitioners cite three cases as indicating a conflict among the U.S. Courts of Appeal on the issues in this case: *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980); *Dennison v. City of Los Angeles Dept. of Water & Power,* 658 F.2d 694 (9th Cir. 1981); and *U.S. v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983). Petitioners do not point to any issues on which these decisions differ with each other, or with the decision of the Court of Appeals in this case.

In fact, each of these decisions was cited as authority by the Court of Appeals in its memorandum decision

(Pet. App. A, pp. 18, 20, 21), and in each, the arguments of plaintiffs who claimed to be "adversely affected non-minority employees" were rejected These cases are perfectly consistent with the decision of the Court of Appeals for the Seventh Circuit in the instant case.

III. No Part Of The Court Of Appeals Decision Is In Conflict With Decisions Of This Court.

A. There Is No Conflict With This Court's Decision In Kremer v. Chemical Construction Corporation.

The issue before this court in *Kremer v. Chemical Construction Corporation,* 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed. 2d 262 (1982) did not arise in the instant case.[1] *Kremer* had to do with the relationship between state and federal proceedings on the same complaint.

This court's decision in *Kremer,* supra, is based upon the provisions of 28 USC Sec. 1738. That statute has nothing to do with this case. As petitioners point out (Petition, p. 13), they were not obliged to pursue in state court the state's unfavorable administrative action on their claim. *Kremer,* supra, at 102 S.Ct. 1891. Nothing in the Court of Appeals decision indicates its disagreement on that point.

Rather, this case involves the effect upon petitioners of a state agency decision, not in their own case, but in

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1. Madison had argued, based on *Kremer,* supra, that petitioners' claim was collaterally estopped by a related proceeding brought unsuccessfully by Detective Croal. Both the District Court and the Court of Appeals dismissed that argument and Madison has not pursued it further.

the case of their female co-workers; a related, but different complaint.

The Court of Appeals did not hold that the state agency order had preclusive effect. Rather, it held that, under the circumstances, Madison's compliance with the state agency order constituted a substantive defense. The state agency's order barred petitioners' suit not because of collateral estoppel, but because the agency order enforced the right of a protected group to be free from discrimination. (Pet. App. A, p. 17)

The Court of Appeals decision in the instant case is consistent with this court's opinion in *Kremer,* supra. The majority in *Kremer,* supra, emphasized that "State anti-discrimination laws . . . play an integral role in the Congressional scheme . . ." *Kremer,* supra, at 102 S.Ct. 1890. The Court of Appeals decision in the instant case is based upon the same analysis of the important role Congress intended state regulation to play in the elimination of employment discrimination.

B. The Court Of Appeals Decision That Madison's Compliance With The State Agency Order Did Not, In And Of Itself, Constitute Prohibited Discrimination, Is Not Inconsistent With Decisions Of This Court.

1. The facts in the instant case are very different from the facts in the cases cited by petitioners.

The District Court adopted the parties' stipulation of facts as its Findings of Fact. (Pet. App. B, p. 25) Those Findings of Fact show that before 1972, pay scales for investigative officers in the Madison Police Department were as follows: (Pet. App. B, p. 26)

Pay Range		*Position*
4	(All Women)	Policewoman II
5	(All Men)	Detective

As a result of a consultant's report in 1971, the detective position was lowered to Pay Range 3. Incumbent detectives were "grandfathered" at Pay Range 5 and retitled "Detective Supervisor". All detectives promoted after the effective date of the new policy would be paid at Pay Range 3. The pay scales after 1972 were as follows: (Pet. App. B, p. 27)

Pay Range		*Position*
3	(All Men)	Detective
4	(All Women)	Policewoman II
5	(All Men)	Detective Supervisor

In 1973, investigation services were reorganized so that male and female detectives all performed the same duties. Job titles were changed to remove sex designations. The pay scales and titles were then as follows: (Pet. App. B, p. 27)

Pay Range		*Position*
3	(All Men)	Detective
4	(All Women)	Detective II
5	(All Men)	Detective Supervisor

It was stipulated that, after late 1973, all detectives performed the same duties. (Pet. App. C, p. 48) The District Court did not find that this situation violated any right of petitioners and, in fact, petitioners did not argue that it did. The Court of Appeals was not asked to find that this situation constituted prohibited discrimination.

Yet it is important to note that this is the pay situation that existed before the acts complained of took place.[2]

In 1975, two women, Detective II's, filed a complaint with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations (DILHR) alleging sex discrimination. (Pet. App. B, p. 27). Madison defended, but DILHR found that Madison had discriminated against them, in violation of Wisconsin's Fair Employment Act, and ordered Madison to promote the two to Detective Supervisor at Pay Range 5. Madison did not seek judicial review, but complied with the order. (Pet. App. C, p. 47)

Petitioners alleged that this compliance discriminated against them in two ways: (1) the women received a pay raise unavailable to them, while work was equal; (2) Madison not only promoted the two complainants as ordered by the agency, but also voluntarily promoted the remaining three female Detective II's who had not filed any complaint. (Petition, pp. 20, 21)

The District Court found all the promotions to be discriminatory, in violation of Title VII. (Pet. App. B, pp. 30, 31) The Court of Appeals reversed, finding neither action prohibited. (Pet. App. A, pp. 18-22) Petitioners claim this holding is inconsistent with decisions of this Court (Petition, pp. 17-20) affecting seniority rights of

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2. Detective Croal had complained of this situation and it was this complaint which had been dismissed by the state court. (Pet. App. B, p. 34) Croal's complaint to the District Court, based on the same fact situation, was dismissed by the District Court because of this court's holding in *Kremer*, supra.

"adversely affected non-minority employees" and affecting the showing necessary by discriminatees who wish to avail themselves of remedial orders.

First, it must be emphasized that petitioners have never claimed that Madison has violated the provisions of its collective bargaining agreements. At no time have they claimed that any of the actions they challenge were taken in violation of the collective bargaining agreements in effect between the parties. Thus, to the extent that any of the decisions of this Court which they consider applicable are based upon violations of agreements between the parties, those decisions do not apply to this case.

Next, as has already been explained, petitioners have not suffered any effects on their seniority rights in the manner that non-minority employees suffered in *Stotts,* supra, in *Teamsters,* supra, in *Franks,* supra, or in *Ford Motor Co. v. EEOC,* supra.

The challenged state agency order awarding promotions to the women detectives included no order of non-competitive seniority of the type that was challenged in those cases. The promotion did include higher "classification seniority" which affects only areas where, by contract, employees are allowed certain limited choices.

The District Court, finding in petitioners' favor, made no reference to seniority rights. (Pet. App. B, p. 30) Neither did their administrative complaint to the EEOC or their complaint (pleading) in the District Court (Resp. App. A, B), make any reference to seniority or to Sec. 703(h) of Title VII. They complained of unequal pay for equal work and the District Court and the Court of Appeals dealt with their complaint on those terms.

2. Petitioners misunderstand the application of this Court's "seniority" cases to this case.

Finally, petitioners have misunderstood the holdings of the cited cases regarding the showing which a discriminatee must make in order to qualify for a remedy. In *Stotts,* supra, the District Court had issued, and the Court of Appeals (6th Cir.) upheld, an injunction under which recently hired black firefighters would be protected from layoff, in preference to white firefighters with greater seniority. The protected black firefighters need not have been plaintiffs in the lawsuit which precipitated the consent decree. In fact, they would not even have had to be eligible for employment as firefighters when the suit was filed. They might even have been under 18 years of age.

It is that situation this Court refers to when it says ". . . mere membership in the disadvantaged class is insufficient to warrant a seniority award." *Stotts,* supra, at 104 S.Ct. 2588.

Petitioners confuse the steps necessary to establish a right to a remedy in a class action and in an individual case.

In the *Stotts* case, as this Court pointed out, there had been no finding that any of the blacks protected from layoff had been a victim of discrimination and there had been no remedy awarded to any of them before the injunction was amended. That was not the situation with the policewomen.

The female detectives were not "mere members of a disadvantaged class". Their suit was not a class action or a "pattern and practice" suit, as were *Stotts, Teamsters,* etc. They were individual complainants and, had

they not shown themselves to be affected by the claimed discrimination, they could not have prevailed in their suit.

The two policewomen had not been allowed to attend police training classes with men, and had not been allowed to compete for promotion of any kind. (Pet. App. C, p. 43) Those discriminatory practices "had an impact on them". *Stotts,* supra, at 104 S.Ct. 2588. As the Court of Appeals pointed out, plaintiffs offered no reason to doubt that the women had the ability to be detectives. (Pet. App. A, p. 22) The Court of Appeals was offered no reason to doubt the necessity or propriety of the remedy ordered by the state agency.

Nor did the former policewomen have any obligation to prove that they would have been promoted to Detective, had they been allowed to compete. Petitioners have misconstrued this Court's holding in *Teamsters v. U.S.,* supra. That case was a class action and it included preferential seniority as a remedy; yet this Court did not require each class member to prove he applied for the job he was discriminatorily denied. Rather, this Court said:

> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. 431 U.S. at 366, 97 S.Ct. at 1870.

If petitioners are arguing that the former Policewomen II's had to show that, had they been permitted to take the Detective examination, they would have been selected as Detectives, the above quoted language from this Court's decision in *Teamsters,* supra, makes abundantly clear that no such requirement exists.

Petitioners rely on the same misunderstanding of this Court's holdings in *Stotts,* supra, *Teamsters,* supra, and *Franks,* supra, for their claim that Madison violated Title VII when it voluntarily promoted three former policewomen whose situation was the same as the two who filed complaints but who, themselves, filed no complaints.

First, it should be noted that petitioners do not claim this unilateral act affected them in any way. Petitioners remained at Pay Range 3 while the three former Policewomen II's were raised from Pay Range 4 to Pay Range 5. Thus, while the former Policewomen II's would be paid more than petitioners, that had always been true.

None of the former Policewomen II's received competitive seniority, except for the "classification seniority" already discussed.

Nor did petitioners offer any evidence which would have shown that the three non-complainants, or any one of them, had been affected differently by the prior sex discrimination in the Police Department than the two former Policewomen II's who filed complaints.

In short, petitioner's objection to these promotions is the same as their objection to the first two promotions. It is based on their mistaken belief that this Court in *Stotts, Teamsters,* and *Franks,* supra, held that a victim of discrimination must prove he or she *would have been promoted* but for discrimination. Those cases contain no such holding.

C. The Court Of Appeals Decision Affirming The District Court's Holding That Belle Stephenson's Promotion Did Not Constitute

Prohibited Discrimination Is Not In Conflict With Any Decision Of This Court.

Petitioners offered no decision of this Court which might conflict with the decisions of both lower courts on this issue. The District Court pointed out that Stephenson had served longer as a Policewoman II than all but one of the petitioners had served as a Detective. (Pet. App. B, pp. 29, 30) The Court of Appeals stressed that merely removing all the barriers to promotion would not have placed Stephenson in the position she would have occupied had there never been discrimination. (Pet. App. A, p. 9)

Because both lower courts found the promotion not to be discriminatory, they declined to consider Madison's procedural arguments. (Pet. App. A, pp. 9, 10; Pet. App. B, p. 30) It should be noted, however, that the pleadings contain no mention of Stephenson's promotion from Policewoman to Policewoman II. Although it took place in 1974, it was not the subject of a timely administrative complaint. Petitioner's administrative complaints, based only on the higher pay paid to the two former policewomen who were the subject of the state agency's remedial order, were timely filed in April, 1979. (Pet. App. C, p. 48; Resp. App. A, B)

Stephenson's promotion is irrelevant to petitioners' allegations of pay discrimination because other females were receiving higher pay than petitioners for the same work both before and after Stephenson was promoted. As an individual act of discrimination, however, neither of the two lower courts had jurisdiction to consider it because it was an issue not raised by the pleadings, and

not the subject of a timely administrative complaint. See *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127 (1982).

IV. CONCLUSION: NO WRIT SHOULD ISSUE.

The petition in this case fails to meet any of the criteria established in this Court's Rule 17 for the issuance of writs of certiorari. The facts are unique, and thus will almost certainly never arise again anywhere. Petitioners have pointed to no important question of federal law which has not been, but should be settled by this Court Nor have they shown that there exists an issue on which there is conflict in the Courts of Appeal, or that there is any inconsistency between the Court of Appeals decision in this case and any decisions of this Court. There is no reason for a writ to issue.

Respectfully submitted,

HENRY A. GEMPELER
City Attorney

EUNICE GIBSON
Assistant City Attorney

September 19, 1984

APPENDIX A

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION
EQUAL RIGHTS DIVISION

KENNETH D. COUTURE; ROBERT J. FAUST; LEMUEL B. FRASER; DENNIS A. GERFEN; WILLIAM S. GILFOY; BERNARD D. HEBARD; RUDOLPH J. JERGOVIC; STEVEN A. KOECKE; ROBERT M. LOMBARDO; RICHARD J. MILLER; STEVEN D. REINSTRA; FRANCIS L. RETELLE; JON F. SIPPL; GERALD R. WHITFIELD; JOHNNY E. WINSTON and JAMES I. GRANN,

Complainants,

v.

CITY OF MADISON, POLICE DEPARTMENT,

Respondent.

COMPLAINT OF DISCRIMINATION

Complainants, through their attorneys, Lawton & Cates by Richard V. Graylow, complain of the discriminatory employment practices of the Madison Police Department (MPD) as follows:

1. All Complainants are males occupying the rank classification of Detective in the Police Department of the City of Madison, Madison, Dane County, Wisconsin. The Police Department is located at 211 South Carroll Street, Madison, Wisconsin. Its Chief Executive Officer is Chief David C. Couper of the same business address. The names

of the Complainants and their effective dates of promotion or entry to the rank classification of Detective follows hereafter:

ERD #7900028(a)	Kenneth D. Couture	3/13/78
#7900029(b)	Robert J. Faust	8/25/74
#7900030(c)	Lemuel B. Fraser	8/25/74
#7900031(d)	Dennis A. Gerfen	7/2/78
#7900032(e)	William S. Gilfoy	6/1/75
#7900033(f)	Bernard D. Hebard	9/3/72
#7900034(g)	Rudolph J. Jergovic	8/6/78
#7900035(h)	Steven A. Koecke	1/11/76
#7900036(i)	Robert M. Lombardo	6/1/75
#7900037(j)	Richard J. Miller	8/25/74
#7900038(k)	Steven D. Reinstra	7/2/78
#7900039(l)	Francis L. Retelle	6/1/75
#7900040(m)	Jon F. Sippl	1/11/76
#7900041(n)	Gerald R. Whitfield	8/25/74
#7900042(o)	Johnny E. Winston	3/5/78
#7900043(p)	James I. Grann	8/25/74

2. All Complainants herein are entitled to the protection and benefits accorded by Section 111.31 et seq., Wis. Stats. All are "employees" within the meaning of the Fair Employment Act (FEA).

3. The City of Madison was and continues to be a City of the second class and an "employer" as defined in Section 111.32, Wis. Stats. At all times material hereto, the City of Madison was the employer of all named Complainants.

4. All Complainants have for varying periods of time prior to and inclusive of the date of this complaint been performing duties and responsibilities identical to those performed by the following sworn commissioned personnel, each of whom are females:

(a) Mary R. Ostrander; and

(b) Mary F. Otterson.

5. Even though the work of the Complainants and the work of Ostrander and Otterson was and continues to be substantially similar, the wages paid to these Complainants have been substantially less.

6. The Complainants have been discriminated against by the City of Madison because of their sex.

WHEREFORE, These Complainants, individually and collectively, request the entry of remedial Orders providing as follows:

1. Adjudicate the conduct of the City of Madison as described herein as unlawful;

2. Prohibit the perpetuation and continuation of the described illegal conduct in the future.

3. Award full back pay and fringe benefits equalling those paid and accorded to Ostrander and Otterson; and

4. Provide for such other and further relief as may be appropriate in these circumstances.

Dated this 20 day of December, 1978.

/s/ Richard V. Graylow
LAWTON & CATES
By: Richard V. Graylow
110 East Main Street
Madison, WI 53703

Attorneys for Complainants

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

JAMES I. GRANN, being first duly sworn, on oath deposes and says that he is a Complainant herein; that he has read the foregoing complaint of discrimination and knows the contents thereof; that the same is true to his own knowledge except as to matters therein stated on information and belief; and that as to such matters he believes the same to be true.

/s/ James I. Grann III

Subscribed and sworn to before me
this 18 day of December, 1978.

/s/ Richard V. Graylow
NOTARY PUBLIC, Dane County, Wisconsin
My commission: Permanent

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JON F. SIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFEN, LEMUEL B. FRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs,

vs.

CITY OF MADISON, a municipal corporation,

Defendant.

COMPLAINT
(Filed November 10, 1981)

The plaintiffs, by their attorneys, Bell, Metzner & Gierhart, S.C., allege the following claim for relief:

JURISDICTION

Jurisdiction of this court is founded on the existence of a federal question. The action arises under 42 U.S. Code, §2000E(f) (3) and 28 U.S. Code §1343(4).

IDENTIFICATION OF THE PARTIES

(1) Plaintiff, James I. Grann, is an adult who resides at 5313 Camden Road, Madison, Wisconsin. He is employed by the City of Madison as a police detective.

(2) Plaintiff, Johnny E. Winston, is an adult who resides at 15 Lake Shore Court, Madison, Wisconsin and is employed by the City of Madison as a police detective.

(3) Plaintiff, Gerald R. Whitfield, is an adult who resides at 14 Starr Court in the City of Madison. He is employed by the City of Madison as a police detective.

(4) Plaintiff, John F. Sippl, is an adult who resides at Six Stacey Lane in the City of Madison and is employed by the City of Madison as a police detective.

(5) Plaintiff, Francis L. Retelle, is an adult who resides at 2239 Commonwealth Street in the City of Madison. He is employed by the City of Madison as a police detective.

(6) Plaintiff, Steven R. Reinstra, is an adult who resides at 1022 Northland Street in the City of Madison and is employed by the City of Madison as a police detective.

(7) Plaintiff, Richard J. Miller, is an adult who resides at 1218 Iowa Drive in the City of Madison and is employed by the City as a police detective.

(8) Plaintiff, Robert M. Lombardo, is an adult who resides at 5402 Voges Road in the City of Madison and is employed by the City as a police detective.

(9) Plaintiff, Steven A. Koecke, is an adult who resides at 5005 Woodburn Street in the City of Madison and is employed by the City as a police detective.

(10) Plaintiff, Rudolph J. Jergovic, is an adult who resides at 4222 Tomscott Trace in the City of Madison and is employed by the City as a police detective.

(11) Plaintiff, Bernard D. Hebard, is an adult who resides at 4313 Mandrake Street in the City of Madison and is employed by the City as a police detective.

(12) Plaintiff, William S. Gilfoy, is an adult who resides at 5409 Painted Post Road in the City of Madison and is employed by the City as a police detective.

(13) Plaintiff, Dennis A. Gerfen, is an adult who resides at 1616 Madison St. in the City of Madison and is employed by the City as a police detective.

(14) Plaintiff, Lemuel B. Fraser, is an adult who resides at 2027 East Mifflin Street in the City of Madison and is employed by the City as a police detective.

(15) Plaintiff, Robert J. Faust, is an adult who resides at 1937 Thackery Street in the City of Madison and is employed by the City as a police detective.

(16) Plaintiff, Kenneth D. Couture, is an adult who resides at Six Manor Hill in the City of Madison and is employed by the City as a police detective.

(17) The defendant is a municipal corporation existing by virtue of the law of the State of Wisconsin.

(18) The plaintiffs above named on or about September 1, 1981 received Notice of Right to Sue letters issued by the U.S. Justice Department advising them that they had 90 days from the date of receipt of the Notice of Right to Sue letter to file in the United States District Court, civil actions under Title VII of the Civil Rights Act of 1964 as amended by 42 U.S. Code §2000E et seq. By virtue of receipt of the Notice of Right to Sue letters, this court has jurisdiction over the claims for relief set forth below.

FIRST CLAIM FOR RELIEF

(1) The plaintiffs above named have been employed by the defendant as detectives at a base pay level of Grade "03."

(2) The defendant has employed two female employees, Belle Stephenson and Mary Otterson. In 1973 Stephenson and Otterson were reclassified as "Detective II" by the defendant. They were given a base pay range one grade above that of the plaintiffs.

(3) In 1977 the two female employees were raised to a pay grade of "05" and were reclassified as "Detective Supervisors" by the defendant.

(4) All plaintiffs have for varying periods of time prior to and inclusive of the date of this complaint been performing duties and responsibilities identical to those performed by Mary Otterson and Belle Stephenson. The plaintiffs above named have had the same job description, have been given the same assignments, and have done work which has been no less demanding than that given to the female employees.

(5) The defendant has discriminated against the plaintiffs above named by paying them at a lower rate of compensation, because of their sex, than has been paid to the two female employees, in violation of 42 U.S. Code §2000E et seq.

SECOND CLAIM FOR RELIEF

(6) Reallege and incorporate herein by reference as if set forth in full paragraphs 1 through 5 inclusive.

(7) The plaintiffs above named and the two female detective supervisors have worked and continue to work under similar conditions. Equal skill, effort and responsibility are required of them.

(8) On the basis of sex, the defendant pays the female employees higher base wages for equal work done by

the plaintiffs, in violation of 29 U.S. Code §206(d), the Equal Pay Act.

WHEREFORE, the plaintiffs demand judgment as follows:

(a) For back pay and fringe benefits equaling those paid and accorded to the female employees;

(b) For elevation to Grade "05" and promotion to the rank of Detective Supervisors.

(c) For costs and disbursements, including actual attorney fees incurred by the plaintiffs in this action.

DATED this 10th day of November, 1981.

BELL, METZNER & GIERHART, S.C.
By: /s/ Mark P. Wenderoff
Attorneys for Plaintiffs.

P. O. ADDRESS:
Suite 500, United Bank Building
222 West Washington Avenue
Post Office Box 1807
Madison, Wisconsin 53701

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

United States Magistrate William L. Gansner has been specially designated by this court to conduct any and all proceedings, including jury and nonjury trials, in those civil cases in which all of the parties consent.

Pursuant to 28 U.S.C. § 636(c) (2), you are hereby notified of your right to consent to have all further pro-

ceedings in your case handled by United States Magistrate Gansner. Consent forms for this purpose are available from the clerk of the court.

Your decision to give or to withhold such consent is entirely voluntary.

Consent of the parties permits the magistrate to preside over all aspects of your case, but it does not guarantee that the magistrate will preside. The court retains residual authority, on its own motion or for good cause shown, to remove a reference of a case to a magistrate.

Your attention is also directed to the provisions of 28 U.S.C. §§ 636(c) (3)-(5) concerning appeals from judgments of the magistrate.

Joseph W. Skupniewitz
Clerk, U.S. District Court
Western District of Wisconsin

Office-Supreme Court, U.S.
F I L E D
SEP 28 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-304

In The

Supreme Court of the United States

October Term, 1984

—o—

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JON F. SIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFEN, LEMUEL B. FRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs-Petitioners,

v.

CITY OF MADISON, a municipal corporation,

Defendant-Respondent.

—o—

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

BELL, METZNER & GIERHART, S.C.

BARRETT J. CORNEILLE
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September 28, 1984

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THE RESPONDENT'S ACTIONS ADVERSELY AFFECTED THE PLAINTIFFS

The defendant/respondent claims its actions did not adversely affect the plaintiffs. Respondent's Brief at P. 8. This purely factual argument is inappropriate in the brief in opposition to the plaintiffs' Petition for Writ of Certiorari.

Further, the claim is specious in light of the fact that the parties stipulated in the District Court to the defendant's prima facie violation of 28 U.S.C. Sec. 206(d)(1). Petitioners' App. at 26. Accordingly, the Court of Appeals' Decision is devoid of any discussion regarding whether or not the plaintiffs were the victims of discrimination. Petitioners' App. at P. 1-24. The fact that discrimination occurred against the plaintiffs has been a "given" in this case from its inception.

When the females were promoted, they were promoted to a pay range two grades higher than the males. Petitioners' App. at P. 47. Their promotions were based solely on sex. *Id.* The promotion of the females increased their classification seniority, which gave them a preferential choice of vacation time, work schedule, and job assignment. Petitioners' App. at 49. Finally, since the rank of detective supervisor was to be limited to 24 individuals, the promotion of five females into that rank prohibited five of the plaintiffs from competing for the limited number of jobs within that pay range. Petitioners' App. at 49.

The extent to which the plaintiffs were affected is not probative. As this court recently stated:

> Undoubtedly, not much money and seniority are involved, but the amount of money and seniority at stake does not determine mootness. As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot, notwithstanding the size of the dispute. *Powell v. McCormack*, 395 U.S. 486, 496-498, (1969). Moreover, a months pay is not a negligible item for those affected by the injunction, and the loss of a months competitive seniority may later determine who gets a promotion, who is entitled to bid for transfers, or who is first laid off if there is a reduction in force. *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S.Ct. 2576, 81 L.Ed2d 483, (1984).

Accordingly, the defendant's argument that the plaintiffs were not affected by its decision to promote five females to the rank of detective supervisor, is without merit.

THE ISSUE DECIDED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS CLEAR AND NOT LIMITED TO THE FACTS BEFORE IT

The defendant contends that the petitioners misstate the issue determined by the Seventh Circuit Court of Appeals. In order to respond to the defendant's argument in this regard, it is necessary only to review the written decision rendered by the Seventh Circuit. In the first sentence of that decision, the Court of Appeals characterized the issue before it as follows:

> A combination of facts, apparently unique, presents us with a case of first impression regarding the relationship between the federal enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2000e-17, and state enforcement of state fair unemployment laws. Petitioners' App. at P. 2.

Later on in its decision, the Seventh Circuit narrowed the precise issue before it as follows:

> The final issue we must confront is also the most difficult, did the District Court err in holding that reliance on a state agency's order cannot be a defense to a Title VII claim? Petitioners' App. at P. 10.

After defining the general and specific issues before it, the Seventh Circuit concluded that:

> . . . reliance on a state agency's order enforcing the right of a protected group to be free from discrimination in employment is an absolute bar to a suit by fellow employees, claiming that the action required by the remedial order constitutes a violation of Title VII. Petitioners' App. at P. 17.

The Decision was not based upon the facts determined by the District Court. Rather, the Seventh Circuit's holding was based entirely upon its understanding of the relationship between Title VII and state enforcement of state fair employment laws. Petitioners' App. at P. 2.

Accordingly, the precedent established by the Seventh Circuit's decision violates the due process rights of all employees adversely affected by state administrative agency orders.

The defendant correctly states that at no time prior to their petition to this court did the plaintiffs assert that the state agency's remedial order in this case affected their constitutional rights. Respondent's Brief at P. 11. However, prior to the decision rendered by the Seventh Circuit, not even the defendant had the temerity to argue that the

agency's order granting the females a promotion was not reviewable in the Federal Courts. As the defendant embarrassingly admits in its brief, the plaintiffs:

> . . . were not obliged to pursue in state court the state's unfavorable administrative action on their claim. *Kremer, supra,* at 102 S.Ct. 1891. Nothing in the Court of Appeals' Decision indicates its disagreement on that point. Respondent's Brief at P. 14.

The plaintiffs agree with the defendant, that prior to the Seventh Circuit's Decision in the case at bar, there was no rule of law that mandated the plaintiffs seek state court review of the unfavorable administrative order. Unfortunately, the United States Circuit Court for the Seventh Circuit clearly held that the failure to obtain such a review created an absolute bar to the plaintiffs' Federal Court action.

The language used by the Seventh Circuit in that regard is unambiguous:

> . . . the only rationale resolution of the issue posed by the plaintiffs is to hold that reliance on a state agency's order enforcing the right of a protected group to be free from discrimination in employment *is an absolute bar to a suit by fellow employees claiming that the action required by the remedial order constitutes a violation of Title VII.* Petitioners' App. at P. 17 (emphasis added).

Nor is the effect of that language softened by the defendant's argument that the plaintiffs could have been parties to the females' state court action.

At the beginning of its responsive brief, the defendant claimed that the plaintiffs could not "accurately be characterized as employees adversely affected" by the state administrative order. Respondent's Brief at P. 6, 8.

Later on, in response to the plaintiffs' claim that forcing them to become parties to the female's state court claims violated the plaintiffs' constitutional rights, the defendant asserted that the plaintiffs could have been parties to the females' state administrative action, under Wisconsin's "liberal definition of the term party as it is used in Chapter 227." Respondent's Brief at P. 12.

The definition of party is set forth in Chapter 227.01, Wis. Stats., (1981-1982). As noted by the defendant, a party is defined as "any person whose substantial interests may be adversely affected." Respondent's Brief at P. 12. Apparently, the respondent is only willing to admit that the plaintiffs' "substantial interests" were adversely affected by the state administrative ruling when this supports the defendant's argument concerning the constitutional "guarantees," established in Chapter 227 of the Wisconsin Statutes. The Court will recall that the Respondent took the opposite position when addressing the issue of discrimination.

THE DEFENDANT HAS PROVIDED NO JUSTIFICATION FOR PROMOTING FIVE FEMALES TO THE RANK OF DETECTIVE SUPERVISOR WHEN THE ADMINISTRATIVE AGENCY ORDER MANDATED THAT ONLY TWO BE PROMOTED

At Page 17 of its brief, the defendant correctly identified one of the plaintiffs' claims against it. That claim is that ". . . Madison not only promoted the two complainants as ordered by the agency, but also voluntarily promoted the remaining three female Detective II's who had not filed any complaint." Respondent's Brief at P. 17. The three females who were not parties to the state agency proceedings, but were nevertheless promoted by the City

were neither members of a class nor individual plaintiffs. Accordingly, it is difficult to conceptualize any legal basis for their promotion.

The United States Court of Appeals for the Seventh Circuit ignored this issue, in light of its holding that state agency remedial orders constitute "an absolute bar to a suit by fellow employees, claiming that the action required by the remedial order violates their Title VII rights." Petitioners App. at P. 17. In other words, since the remedial order was an absolute bar, the plaintiffs in this case had no right to question whether or not the city's actions were in compliance with it.

The defendant arrogantly claims that it "voluntarily promoted the other three detective II's, whose situation was the same as the two ordered promoted by the state administrative agency." Respondent's Brief at P. 21. There is not a shread of evidence in the record to support this claim, nor can it be the plaintiff's burden to prove that the promotion of the three additional female detectives was improper.

Once the defendant conceded the plaintiffs' prima facie case, it became the defendant's burden to present evidence that the three females who were not parties to the initial state agency action would have been considered for promotion "but for" prior discrimination. Petitioner's App. at P. 26.

———o———

CONCLUSION

The Seventh Circuit unambiguously held as follows:

> . . . Reliance on a state agency's order enforcing the right of a protected group to be free from discrimination in employment *is an absolute bar to a suit by fellow employees claiming that the action required by the remedial order constitutes a violation of Title VII.* Petitioners' App. at P.17 (emphasis added).

Accordingly, the only remedy available to an employee adversely affected by a state agency order is to intervene in the state agency proceeding as outlined in the Seventh Circuit's opinion. Petitioners' App. at P. 23. The constitutional deficiencies in requiring intervention are manifest.

In addition, the Seventh Circuit's Decision accords state agency orders res judicata effect against non parties. This is in clear violation of this court's recent holding in *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 102 S.Ct. 1883, 1891, 72 L.Ed 2d 262, (1982).

Finally, the Seventh Circuit's Decision cannot stand in light of this court's clear statement in Kremer that:

> A state agency determination does not preclude a trial de novo in Federal Court (citation omitted). Congress made it clear beyond doubt that state agency findings would not prevent a Title VII complainant from filing suit in Federal Court. *Kremer* at 102 S.Ct. 1883, 1900.

Respectfully submitted this 28 day of September, 1984.

BELL, METZNER & GIERHART, S.C.
BARRETT J. CORNEILLE

Attorneys for Plaintiffs

September 28, 1984